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# NOW AND THEN: THE UNCERTAIN STATE OF NINETEENTH-CENTURY AMERICAN LEGAL HISTORY

WYTHE HOLT*

Two conclusions must be drawn by anyone who attempts a survey of nineteenth-century American legal history. First, there is no general agreement on what "legal history" is or what the utility of legal history research may be. Second, most legal historians either are sure they know what they are doing or are unconcerned with the problem. This is a deplorable state of affairs, but fortunately we are in our infancy and there is sufficient time and few enough practitioners of the art to allow for comprehensive appraisal and debate upon these problems. Hopefully this Article will help to focus the issues and stimulate such a debate.

## I. DEFINITIONS

We must constantly caution ourselves against going about the task of writing legal history from the standpoint that "law" is something studiable by itself. We have, perhaps, from the very existence of the legal profession and of schools in which "law" is "taught," but more likely from our own desire to be considered scholarly, the idea that there is a discipline, a practical subject-matter called "law," internally complete, which is recondite, complex, and difficult to fathom but which nevertheless can be "mastered" or even written about. Thus, we say to ourselves, it must have a history.

Such is not the case. While it is true that there is a great deal of detritus lying about law school libraries, attics of county courthouses, and storerooms in state legislatures, these are merely compilations of words. "Law" has no meaning unless we are attempting to investigate why a statute was passed, what forces and factors influenced any given court decision or administrative ruling, how legal education developed as it did, and why members of the bench and bar play the rigid roles they play. Legal history is only social history, political history, educational history, urban history, and labor history in a fashionable, mystical, and somewhat impenetrable and awesome disguise. Nothing could be less interesting and less useful than tracing how trespass grew into negli-

* Associate Professor of Law and Lecturer in History, University of Alabama. B.A., Amherst College, 1963; J.D., University of Virginia, 1966.

gence, unless one understands and operates from the assumption that legal doctrine grows and changes only to meet certain social needs.[1] Legal history, as Willard Hurst has for so long emphasized, deals both with the effect of social change upon "law" and with the ways in which men use "law" to effect social change.[2] Or, as Oliver Wendell Holmes put it, "[t]he law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race."[3]

This is not to say that we are in no need of Holdsworths. Indeed, so long as our present-day Holdsworth understands that it is social change and not really the growth of doctrine that he is chronicling, he ought to be in much demand. We do not know much at all about the growth of most branches of substantive law during what is called the "formative era of American law,"[4] and the pioneering efforts of Lawrence Friedman,[5] Morton Horwitz,[6]

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[1]*See* Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

[2]*See, e.g.*, W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 (1970); W. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915 (1964); W. HURST, JUSTICE HOLMES ON LEGAL HISTORY (1964); W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950).

An excellent summary of Hurst's work and thought may be found in Murphy, *The Jurisprudence of Legal History: Willard Hurst as a Legal Historian*, 39 N.Y.U.L. REV. 900 (1964); most of his articles and reviews are also referred to in Flaherty, *An Approach to American History: Willard Hurst as Legal Historian*, 14 AM. J. LEGAL HIST. 222 (1970). My own criticism of Hurst's approach has been made at greater length elsewhere. *See* Holt, Book Review, 1971 WIS. L. REV. 982. For other useful criticism of Hurst, see Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 AM. HIST. REV. 744 (1970); Woodard, Book Review, 19 LA. L. REV. 560 (1959).

[3]Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

[4]This era was so called by Roscoe Pound, R. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938), and the concept has been enthusiastically accepted by many ever since. *See, e.g.*, A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA (1965).

[5]*See, e.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973); Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786 (1967); Friedman, *The Dynastic Trust*, 73 YALE L.J. 547 (1964). *See also* Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

[6]*See* Horwitz, *The Transformation in the Conception of Property in American Law: 1780-1860*, 40 U. CHI. L. REV. 248 (1973); Horwitz, *The*

and Harry Scheiber,[7] to mention three outstanding scholars at work in doctrinal history, are most necessary and welcome.[8]

Moreover, since we are dealing with the history of social change in the United States, more attention must be paid to theory. As Hurst expresses it, "legal history research needs more philosophical dimension than it has typically shown, to put it into some context of theory about the working relations of legal processes to the overall structure and processes of American history."[9] Many of our nineteenth-century legal historians do attempt to set their work within a comprehensive theoretical scheme—Hurst and Calvin Woodard[10] being prime examples—but most of the work done so far lacks any sense of philosophy. To be most useful, legal history must attempt to trace the most important ways in which law has been utilized and acted upon in American society. Law and legal institutions have proven to be crucial in American history, and so legal historians, as demonstrated by Richard E. Ellis' valuable book on Jeffersonian times,[11] are dealing with issues and events fundamental to an understanding of American history. To grapple with such material, only a broad and deep theoretical approach will suffice.

The difficulty is that constructing a theory requires having a philosophy; the legal historian must make some hard choices about what has been and, indeed, what ought to be most valuable in the American experience. Only if the writer is capable of judging can he do his job. He must be aware of the broad range of moral choices open to the American people and must have a

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*Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974); Horwitz, "Damage Judgments, Legal Liability, and Economic Development Before the Civil War," to be published in the *American Journal of Legal History*.

[7] *See* Scheiber, *Property Law, Expropriation and Resource Allocation by the Government: the United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973); Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPECTIVES AM. HIST. 329 (1971).

[8] *See* text accompanying notes 31-33, 74-79 *infra*.

[9] Letter from Willard Hurst to Wythe Holt, July 25, 1973.

[10] *See* Woodard, *History, Legal History and Legal Education*, 53 VA. L. REV. 89 (1967); Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962).

[11] R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971). This work is discussed in the text accompanying notes 69, 70 *infra*.

fairly complete notion of how and why certain paths were thought better than others or were thought about incompletely or not at all. He must also understand that much of history is not made through rational human choice. Holmes summed up the task confronting the legal historian:

> The way to gain a liberal view of your subject is . . . in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.[12]

The dangers inherent in this task are enormous. Foremost among them, because most prevalent, is the danger of supposed omniscience. The job of writing anything, but especially legal history, must be approached from a view of enlightened skepticism: there are no absolutes, other people will make other value choices, the universe is a formless and chaotic place. Given that one is unable to take into account all the factors and possibilities that occur randomly to one's active mind, or to put into words the multitude of thoughts which from time to time come to the surface of consciousness, one surely cannot comprehend the whole of the American past nor make all of the correct evaluations of it. People feel differently about things. Events occur that are beyond one's planning capabilities. Dogmatism should be furthest from the mind of someone writing the history of legal dogma, but unfortunately such is rarely the case. The necessary balance between the historian's task of making judgments and his awareness that he will not always make the right ones is precarious, frustrating, and productive in itself of intolerance and rigidity on a grand scale. But the best legal historians will maintain the balance and indeed will sharpen their judgmental acuity by doing so.

Even more dangerous is the probability—given the aversion that most people have to thinking in the ways delineated here, the limited nature of man's capacity to perceive, and the disorder of man's surroundings—that the work of the legal historian will be to no avail. This tends to discourage one from giving to the task the enormous amounts of time, energy, and concentrated seriousness that it requires. Nevertheless the task must be attempted. As Holmes wrote:

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[12]Holmes, *supra* note 3, at 476.

> It does not follow, because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought, that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain.[13]

This view is shared by Hurst: "[T]hough directed effort may have only marginal effects, those effects are humanly important, and . . . in any case our human dignity requires that we make the effort."[14] The idea can be put more positively. Writing into the teeth of chaos is cause for rejoicing rather than despair, because it means that one is free to make mistakes without threat of mysterious damnation, and because it gives rise to two of the greatest joys it is possible to experience: the joy of engaging in activity buoyed by the hope that it might prove useful and the joy of attempting to communicate with and give aid to others.

It occurs to me that, having reached the end of a section entitled "Definitions," I may be thought to have failed to define legal history. I can do no better than repeat the words of Calvin Woodard:

> The true function of Legal History . . . is to help lawyers and legal scholars, who are essentially concerned with current problems, to be meaningfully aware of the past as a healthy check on our often overly-optimistic and unfounded hopes; to provide gentle redress in our moments of frustration and disappointment; to act as an indispensable aid in drawing the ever-difficult distinction between the "temporal" and the "eternal," the changing and the unchanging; and, above all, to provide awareness and appreciation of the value and meaning of "civilization."[15]

## II. Work to Date

### *A. Theme and Theory*

The nature and the amount of work currently being done in the field of nineteenth-century American legal history is, on the whole, disappointing, although the situation is improving. There

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[13] *Id.* at 468.

[14] Letter from Willard Hurst to Wythe Holt, Feb. 22, 1971.

[15] Woodard, *History, Legal History and Legal Education*, 53 Va. L. Rev. 89, 105-06 (1967).

are very few people working from guided theoretical approaches, attempting to delineate and explain important changes in American society. Many studies seem to be motivated by sheer personal interest, by the desire to be chic, or by the necessity of having to write something to get or maintain an academic degree or position. People, of course, should write about that which interests them; but to do so in the absence of a coherent theoretical perspective, without stated values, is wasteful. Those who frankly acknowledge their inadequacy to puzzle through and construct a theoretical approach ought to be content at least to work under some other person who does—to criticize and fill in the interstices of the theoretician's proposals with careful empirical studies, while bearing in mind the theory's philosophical and historical implications.

At least two men have approached the writing of nineteenth-century American legal history from a broad, original, and useful perspective—Willard Hurst of the University of Wisconsin and Calvin Woodard of the University of Virginia—and at least one other, Morton Horwitz[16] of Harvard, shows real promise. At least three others have produced a mature and useful body of work in the field—Harry Scheiber[17] of the history department at the University of California at San Diego, Lawrence Friedman[18] of the Stanford University Law School, and John Phillip Reid[19] at New York University School of Law. While his three-volume history of the United States from colonial times to the present

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[16]In addition to the works cited in note 6 *supra*, see Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973); Horwitz, *The Emergence of an Instrumental Conception of American Law: 1780-1820*, 5 PERSPECTIVES AM. HIST. 287 (1971).

[17]In addition to the works cited in note 7 *supra*, see H. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861 (1969); Scheiber, *Government and the Economy: Studies of the "Commonwealth" Policy in Nineteenth-Century America*, 3 J. INTERDISCIPLINARY HIST. 135 (1972); Scheiber, *On the New Economic History—and Its Limitations*, 41 AGRICULTURAL HIST. 385 (1967).

[18]In addition to the works cited in note 5 *supra*, see L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION (1968); L. FRIEDMAN, CONTRACT LAW IN AMERICA (1965); Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U.L.J. 351 (1969).

[19]*See* J. REID, A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION (1971); J. REID, AN AMERICAN JUDGE: MARMADUKE DENT OF WEST VIRGINIA (1968); J. REID, CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE (1967).

cannot be said to be legal history, Daniel Boorstin[20] has much to say about the interaction between legal institutions and American history. Just coming into prominence are Maxwell Bloomfield,[21] a historian at the Catholic University, Phillip Paludan,[22] in the University of Kansas history department, Richard E. Ellis[23] of the history department at the University of Virginia, Gerald Gawalt,[24] a historian now at the Library of Congress, and William Nelson,[25] educated in both law and history and teaching at the University of Pennsylvania Law School. Working respectively in the colonial and the modern periods, but with significant contributions to a study of the nineteenth century, are Stanley Katz,[26] a historian teaching at the University of Chicago Law School, and Edward White,[27] educated in both law and history and teaching at the University of Virginia School of Law. Special mention must be made of Harold

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[20]*See* D. BOORSTIN, THE AMERICANS (3 vols. 1958, 1963, 1973). Boorstin is a lawyer as well as a historian. *See also* Boorstin, *Tradition and Method in Legal History*, 54 HARV. L. REV. 424 (1941).

[21]*See* Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America*, 15 AM. J. LEGAL HIST. 269 (1971); Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306 (1968).

[22]*See* Paludan, *Law and the Failure of Reconstruction: The Case of Thomas Cooley*, 33 J. HIST. IDEAS 597 (1972); Paludan, *The American Civil War Considered as a Crisis in Law and Order*, 72 AM. HIST. REV. 1013 (1972).

[23]*See* note 11 *supra*.

[24]*See* Gawalt, *Massachusetts Legal Education in Transition: 1766-1840*, 17 AM. J. LEGAL HIST. 27 (1973); Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts: 1740-1840*, 14 AM. J. LEGAL HIST. 283 (1970).

[25]*See* Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974); Nelson, *The Reform of Common Law Pleading in Massachusetts, 1760-1830: Judicial Activism as a Prelude to Legislation*, 122 U. PA. L. REV. 97 (1973); Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States: 1790-1860*, 120 U. PA. REV. 1166 (1972).

[26]*See* Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, 5 PERSPECTIVES AM. HIST. 485 (1971); Katz, *The Origins of American Constitutional Thought*, 3 PERSPECTIVES AM. HIST. 474 (1969).

[27]*See* White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973); White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

Hyman,[28] chairman of the history department at Rice University, both because of his large *oeuvre* and because of the relatively large group of graduate students he has attracted. Hurst, of course, has also achieved due fame for the large number of students and friends who have been inspired by his example and who have accepted his theoretical framework.

The theory and work of Hurst and his "school" clearly provide the most important and useful approach to our field, and so it is logical to begin there. The nineteenth century is viewed by the Hurst school of historians as a time during which Americans concentrated their attention on "release of creative energy"—the economic development of the country's resources by a large group of optimistic, busy, and pragmatic middle-class entrepreneurs who paid little attention to ideology. Law was one of the chief tools utilized to accelerate and cement growth by these bustling Americans, and in turn law and legal institutions were affected by their materialistic emphasis and their success. Hurst has produced an enormous well-researched, and detailed body of work in pursuit of his theory[29] and had the good fortune and magnetism to attract friends and students who write in the same vein and thus amplify in ancillary contexts Hurst's major theses.[30] The value of Hurst's work is immeasurably enhanced by his kindness, social concern, open-mindedness, gentleness, and serious-mindedness.

The most recent product of the "Hurst school" is Lawrence Friedman's *A History of American Law*,[31] which focuses primarily on the nineteenth century. It typifies many of the good and bad traits of the genre. Friedman's approach, while consistent with the tenets of legal realism and with the view that the study of law is an inquiry into the sources, nature, and results of social change, nevertheless follows Hurst in emphasizing economic history and economic problems to the exclusion of almost all other problems. There are two chapters on criminal law, another on the status of "wives, paupers, and slaves" in the Early American period, and

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[28] *See* H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1973); H. HYMAN, ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION (1954).

[29] *See* note 2 *supra*.

[30] *See, e.g.*, Murphy, *supra* note 2, at 938-43. *Primus inter pares* in Hurst's "school" is Lawrence Friedman. *See* note 5 *supra*.

[31] L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973).

a fourth entitled "The Underdogs: 1847-1900," but as noted by Edward White in a recent review:

> [E]ven some of the major social issues of the nineteenth and twentieth centuries are seen to have an economic tinge: Friedman treats the legal problems of slavery primarily as a form of property holding; he views the philosophy of administrative regulation, an ideological innovation of the twentieth century, as a response to the emergence of giant business organizations.[32]

Friedman's book is in many ways encyclopedic in its study of the interaction between and among law, business, and the growth of American abundance. If, however, some chapters seem thin or overblown the reason lies partly in the lack of basic research in certain areas. As the bibliography demonstrates, Friedman has undertaken the enormous task of producing almost all of his own monographic study. Dissertation topics by the hundreds pounce upon the wary student from the pages and especially the footnotes of this book.

A far more serious problem is that Friedman's work pays little attention to ideology or jurisprudence or politics in the nineteenth century and, like Hurst's work, slights or ignores most intellectual trends and most other historians and their theories. It is consensus history, consciously but only slightly self-consciously so, which, while probably mirroring nineteenth-century majoritarian ideological attitudes, denigrates or at least infantilizes radicalism and dissent—although at times one senses that Friedman is helplessly sorry for the havoc that headlong and heartless growth wrought upon the humans who were crushed by it. This history is essentially incapable of dealing adequately with the enormous problems which have permeated the growth and development of middle-class capitalistic entrepreneurship. Hurst himself has been a bit more aware of, as he puts it, the problem of "the legitimacy of the business corporation."[33]

Most other major legal historians of our period seem to share many of Hurst's biases. Friendman belongs to the same "school," while the bulk of Harry Scheiber's excellent work deals with the

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[32]White, Book Review, 59 VA. L. REV. 1130, 1136 (1973). *See also* Presser, Book Review, 122 U. PA. L. REV. 217 (1973).

[33]*See* W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, at 75-111 (1970). For an indication of Hurst's present research interests, see the text accompanying note 103 *infra*.

interrelation of law and economic development.[34] While voluminous, readable and important, Scheiber's contribution produces conclusions essentially no different from those of Hurst. Leonard Levy's one foray into our period—his good biography of Lemuel Shaw—falls into an indistinguishable ideological mold.[35]

A fresh approach has been developing recently, chiefly from the work of Morton Horwitz. His first, seminal article demonstrated how judges began by about 1800 to see their job as one of making law rather than declaring it.[36] Thus, "instrumentalist" judges as conscious policy makers began to aid and abet the development of America's economic resources. Later pieces show how the growth of capitalism moved the substantive law of property and contracts away from enlightenment and humanistic values.[37] Of course, Hurst has always emphasized the connection between the "pragmatic" approach of American nineteenth-century lawmakers and burgeoning economic growth, but his aim was to trace developments rather than to criticize changes in ideology. Horwitz does not see nineteenth-century developments as uniformly benign. In noting the darker side of the intimacy between instrumentalist judges and entrepreneurs, he emphasizes that the law not only facilitated but cemented and protected the enlargement of the political power of the capitalist class. There was, he asserts in another article, concomitantly the beginnings of a "politically conservative ideology of legalism" pervading the thought of legal writers of all kinds.[38] In a way Horwitz has turned Hurst on his head. Future studies should demonstrate the repression of a more democratic, more radical set of legal alternatives, and indeed the first publication by a Horwitz student, Stephen Presser's excellent study of adoption law in America,[39] is an indication that radical concern is and will be more for humanity than for im-

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[34]*See* notes 7, 17 *supra.*

[35]L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW: THE EVOLUTION OF AMERICAN LAW 1830-1860 (1957).

[36]Horwitz, *The Emergence of an Instrumental Conception of American Law: 1780-1820,* 5 PERSPECTIVES AM. HIST. 287 (1971).

[37]*See* works cited note 6 *supra.* These essays and others will also be published in a book dealing with the growth of American law from the Revolution to the Civil War.

[38]Horwitz, *The Conservative Tradition in the Writing of American Legal History,* 17 AM. J. LEGAL HIST. 275, 276 (1973).

[39]Presser, *The Historical Background of the American Law of Adoption,* 11 J. FAMILY L. 443 (1972).

personal economics.[40] It is America's value system, and not her economic system, that most needs scholarly investigation, elaboration, and discussion. These works will legitimize and spawn studies in American legal history upon topics now only the soft underbelly of consensus writing.

But, as William E. Nelson argues in another recent and excellent article, conservatives do not have to utilize the instrumentalist style of reasoning.[41] The bench, influenced in large part by many reasonably wealthy Northerners opposed to slavery and concerned that the "amoral" overtones of instrumentalism could be used, as they were in fact used in the *Dred Scott* case, to justify slavery on pragmatic nationalistic grounds, moved away from the antebellum judicial style in the years following the outbreak of war. The retreat to formalistic reasoning was subsequently put to able use by giant corporations to cement their political position.[42]

Finally, a seminal article by Calvin Woodard deserves attention, not only because of its depth, breadth, and humanity, but because it contains another attempt to establish a field theory for the nineteenth century.[43] For Woodard, the growth of economic productivity during the nineteenth century meant that for the first time in man's history it was conceivable to think in terms of a sufficiency of food and necessaries for every living human. This allowed and indeed demanded a change from laissez-faire thinking, which matured about 1800 and was the dominant philosophy of the period, to welfare-state thinking, a notion attaining general acceptance during the first part of this century. "Laissez-faire" meant utilizing every social means at hand, including the law, to enhance the economic opportunities of each individual. Founded upon the deplorable assumption that proverty was inevitable, justification was had on the moral grounds that the evil are poor, or at least the poor are evil and thus are providentially punished. Welfare-state thinking meant that poverty, having now metamorphosed from a moral necessity to an intolerable economic condition, had to be eradicated, and the state was the only handy

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[40]*See* Thelen, *Collectivism, Economic and Political: Ben Lindsey Against Corporate Liberalism*, 1 REV. AM. HIST. 271 (1973).

[41]Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

[42]Nelson promises to trace this development in a series of forthcoming articles.

[43]*See* Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962).

tool capable of accomplishing this result. Such an historical theory is as comprehensive as that of Hurst's, indeed more so, and ought to explain why radically-oriented people were not so attuned to human deprivations in 1800 as they were in 1950. But unfortunately Woodard has attracted no "school" and has now turned his attention to comparative legal philosophy, so we have no other literature to substantiate and proliferate this conceptual model. This abandonment is regrettable when it is realized that Woodard has many of the same attributes of greatness as Hurst, including an intellectual breadth and an open-minded vision tempered by a stabilizing sense that derives from the realization that all things are not possible. As Woodard has put it, "one way or another, society must come to terms with conduct or conditions, however deplorable, however repulsive, which man has no rational hope of abolishing."[44] This haunting realization, evaded by most, gives others the impetus for abandon or despair, but for Woodard and Hurst it provides reinforcement for inspiration.

### *B. Constitutional History*

There is a bit more to show for the efforts of historical scholarship in the field of constitutional law, but much of what has been done here is even more disappointing, replete with "persistent and uncompromising attention to lawyer's detail, to the exclusion of larger interpretive themes,"[45] and in many instances, too in awe of the judicial mystique or too imbued with consensus to be very critical. It serves no purpose to recapitulate the various histories of the Court or biographies of the Justices. Charles Warren's treatment is both uncritical and out of date.[46] I find Fred Rodell's *Nine Men* useful, if read with a clear understanding of the author's point of view, but it has passed out of print.[47] Desks are beginning to be weighted with the ponderous and seemingly definitive tomes eventually to constitute the Holmes Devise History of the Supreme Court, but the two volumes to appear so far, while comprehensive, are overflowing, pedantic, and tech-

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[44]*Id.* at 286.

[45]Horwitz, Book Review, 85 HARV. L. REV. 1076, 1077 (1972). On the history of the writing of constitutional history, see Belz, *The Realist Critique of Constitutionalism in the Era of Reform*, 15 AM. J. LEGAL HIST. 288 (1971); Belz, *The Constitution in the Gilded Age: The Beginning of Constitutional Realism in American Scholarship*, 13 AM. J. LEGAL HIST. 110 (1969).

[46]*See* C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922).

[47]F. RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790-1955 (1955).

nical.[48] Also, insofar as they fail to take into account broader historical and philosophical themes or to deal with the history of the Court as an institution, they are incomplete. The four-volume collective biography of all Supreme Court Justices in 1969, edited by Leon Friedman and Fred Israel, is useful but uneven.[49] New histories of the Court during various eras have begun to appear, including Bernard Schwartz's treatment[50] of the period from 1835 to 1877 and Loren Beth's contribution to the usually well-done New American Nation series dealing with the period from 1877 to 1917.[51] Beth's book is unfortunately almost too thin and diffuse to be of much utility.

It seems, in the abstract, that perhaps a better way to integrate into Supreme Court studies a modicum of social context would be to write the history of a famous case from its beginning to its final doctrinal and social repercussions. An excellent model, from twentieth-century legal history, has recently been provided by Daniel Carter's monumental *Scottsboro* study.[52] A series of little volumes on important cases during the Marshall and Taney regimes has also appeared. Each has its own merits: Richard Morin's[53] comprehensive pamphlet on *Dartmouth College* is a delightful reminiscence; Gerald Gunther,[54] in the midst of producing two volumes for the Holmes Devise, has discovered some interesting evidence about *McCulloch v. Maryland;* Donald

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[48] J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: I, ANTECEDENTS AND BEGINNINGS TO 1801 (1971), *reviewed,* Flaherty, 40 U. CHI L. REV. 460 (1973), and McDonald, 59 J. AM. HIST. 994 (1973); C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VI, RECONSTRUCTION AND REUNION 1864-1888 (1971), *reviewed,* Casper, 73 COLUM. L. REV. 913 (1973), and Keller, 85 HARV. L. REV. 1082 (1972).

[49] *See* L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS (1969), *reviewed,* Ireland, 15 AM. J. LEGAL HIST. 224 (1971).

[50] B. SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION 1835-1877 (1973).

[51] L. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION, 1877-1917 (1971).

[52] *See* D. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969).

[53] R. MORIN, WILL TO RESIST: THE DARTMOUTH COLLEGE CASE (1969).

[54] G. GUNTHER, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (1969).

Dewey's[55] treatment of the background of *Marbury v. Madison* is eminently readable; and Peter Magrath[56] and Stanley Kutler[57] have produced major, though slight, tomes on *Fletcher v. Peck* and the *Charles River Bridge* case respectively.[58] All have flaws, some serious. A common fault occurs with the telling of the facts. None of the smaller books has the verve, comprehensiveness, or readability of *Scottsboro,* likely because none has the relevance and poignancy of the *Scottsboro* incident, but due in part to a relative dearth of source materials for the first half of the nineteenth century. A worse flaw is in interpretation of the law—even *Scottsboro* fails on some of the evidentiary technicalities. Most of the cases deal with points of law that are somewhat out of date, but there is no excuse for inaccuracy in explaining them. Finally, not a great deal of attention is paid to some of the broader theoretical implications of the cases. The best example lies in the most ambitious and thought-provoking volume, Kutler's *Privilege and Creative Destruction.*[59] The holding of the majority in *Charles River Bridge*[60] is actually a quite narrow statement that legislative charters for businesses will be read strictly; it is only in dicta that the Court speaks of "creative destruction."[61] It is also important to investigate, then, the gap between the popular interpretation that the Court approved entrepreneurial innovation and the true, narrow holding. One wonders why such gaps exist and whether they are perpetrated. Why do dicta, dissents, and "aura" mean more than a strict holding? What then is the function of the narrow holding? Basically, more time, thought, and care must be put into future studies of this type if they are to achieve maximum utility.

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[55]D. DEWEY, MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF MARBURY V. MADISON (1970).

[56]C. MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC, THE CASE OF FLETCHER V. PECK (1966).

[57]S. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971).

[58]*See also, e.g.,* M. BAXTER, THE STEAMBOAT MONOPOLY: GIBBONS V. OGDEN 1924 (1972); Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts,* 5 PERSPECTIVE AM. HIST. 329 (1971).

[59]A good review of Kutler's book, a student work product from my seminar, is to be found at 24 ALA. L. REV. 249 (1971).

[60]36 U.S. (11 Pet.) 420 (1837).

[61]*Id.* at 546-47.

Special notice must be taken of two articles by Phillip Paludan. "Low and the Failure of Reconstruction"[62] is a thoughtful, provocative, and remarkably even-handed treatment of the interplay between jurisprudence and constitutional history. It shows in particular how Thomas Cooley, adhering strongly to belief in the negative state and fearing that large accretions to national power might threaten the stability of the union, was forced to neglect his Free Soil and Jacksonian Democratic roots in order to urge a restrictive interpretation of the privilege and immunities clause of the fourteenth amendment. The view that the Civil War can best be interpreted as "A Crisis in Law and Order" is developed in the second article,[63] resting on the thesis that nineteenth-century Americans believed law to be an expression of popular sentiment and were convinced that law and order must be maintained at all costs. These contain a fresh jurisprudential approach to the legal history of the period. Paludan is now at work upon a study of local courts and small community in the nineteenth-century United States a much-needed endeavor in an area in which almost nothing has been done.[64]

In an important essay William Nelson propounds the view that the doctrine of judicial review did not assume its present meaning and function until about 1820.[65] Prior to that time, state courts did not decide many questions concerning fundamental social issues, leaving such issues to legislatures and upholding legislative resolutions that seemed broadly supported. After 1820, courts acting under an increasingly instrumentalist theory of judicial decision-making found that minorities had to be protected from tyrannous majorities.

Two other monographic studies demonstrate what can be done in the area of constitutional history. Russel Nye has attempted to show how abolitionists both gathered crucial political

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[62]Paludan, *Law and the Failure of Reconstruction: The Case of Thomas Cooley*, 33 J. HIST. IDEAS 597 (1972).

[63]Paludan, *The Civil War Considered as a Crisis in Law and Order*, 72 AM. HIST. REV. 1013 (1972).

[64]The only detailed study of the flow of business through a trial court of general jurisdiction is F. LAURENT, THE BUSINESS OF A TRIAL COURT: 100 YEARS OF CASES, A CENSUS OF ACTION IN THE CIRCUIT COURT FOR CHIPPEWA COUNTY, WISCONSIN, 1855-1954 (1959).

[65]Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166 (1972).

support and added new meaning to the word "man" through their demonstration that those who advocated slavery threatened the civil liberties of white men as well as black.[66] Arnold Paul has ably demonstrated the degree of conservatism of the great bulk of the bar during the beginnings of social convulsion in the United States in the late 1880's and early 1890's.[67] Charles McCurdy, a student of Scheiber at the University of California at San Diego, is completing a dissertation on "Justice Field and the Jurisprudence of Government-Business Relations" from which he hopes to derive two studies, one on the judicial allocation of resources among competing groups in the Far West, and another, more jurisprudentially oriented, dealing with the interaction of the Supreme Court and the "changing role of government in promoting and regulating the economy."[68] Scheiber himself is at work on a study of American federalism, 1790 to the present.

One other book deserves extended attention. Richard E. Ellis, an immensely capable historian who refuses to be fit into any school of theoretical mold,[69] has written a monograph on the meaning of the election of Jefferson in 1800, which provides important insights into the nature and constitution of the nascent judicial system at both the state and federal levels. *The Jeffersonian Crisis*[70] ought to stimulate further investigation into eighteenth-century views regarding the task and nature of judging, the attitudes of judges and lawyers regarding the same topic, and the functioning and makeup of the bench from about 1750 to 1810, including the meaning at that time of such fundamental

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[66]R. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830-1860 (2d ed. 1963).

[67]A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH 1887-1895 (1969). Equally well done is the study by B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT (1942).

[68]This, and all the other information concerning work currently in progress, results primarily from questionnaires sent by me to a small group of colleagues and friends in legal history, and to some of their students. The list of addresses was developed haphazardly and I apologize for the omissions which likely occurred. I am grateful for the warm, complete, and relatively quick responses received.

A more general listing of work in progress, still useful although unfortunately already out of date, is to be found in Bell, *Research in Progress in Legal History*, 17 AM. J. LEGAL HIST. 66 (1973).

[69]*But cf.* Holt, Book Review, 16 AM. J. LEGAL HIST. 197 (1972).

[70]R. ELLIS, *supra* note 11.

notions as judicial tenure. How, for instance, did the state of Georgia endure for its first half-century without a supreme court? Ellis is currently at work on a long article entitled "The Transformation of the States' Rights Argument, 1776-1833," which should prove equally stimulating.

### *C. Substance and Procedure*

Although until recently the most neglected aspect of nineteenth-century legal history, detailed and sophisticated treatments of various areas of substantive and procedural law are beginning to appear.[71] Hurst has been a pioneer here and his monumental study of the lumber industry in Wisconsin contains fairly thorough treatments of contract, tort, real property, and taxation.[72] Soon these areas will be accorded extensive coverage, which is really the *sine qua non* for establishing an intelligent lecture course syllabus in American legal history.

The field of property law has received, simultaneously, attention from two important legal historians. In "Property Law, Expropriation, and Resource Allocation of the Government,"[73] Harry Scheiber has written a thoroughly researched and important history of eminent domain during the nineteenth century. He has demonstrated, within the framework of his and Hurst's theoretical approaches, that expropriation was used throughout the period as a conscious instrument of resource allocation at the state level. Eminent domain was used to promote and even to subsidize some types of entrepreneurial enterprise at the expense of older "vested" interests, and there was widespread transfer of this important power by legislatures directly to elements of the private sector. Scheiber plans to publish a larger work dealing with property and regulation by state governments in the nineteenth century, incorporating this article and another on *Munn v. Illinois*.[74] He does not deal in detail with the interesting

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[71] An excellent student note details the growth of admiralty jurisdiction in the nineteenth century. Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. (1954). *See also* Mark DeWolfe Howe's classic study of the growth of democracy in juries. Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939).

[72] W. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915 (1964).

[73] *See* Scheiber, *Property Law, Expropriation, and Resource Allocation by the Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973).

[74] Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPECTIVES AM. HIST. 329 (1971).

and crucial philosophical problem of why indirect and consequential damages of expropriation were not deemed compensable, but Morton Horwitz will soon favor us with a treatment of the growth of damages law in the nineteenth century.[75] Horwitz has already published a seminal work on the history of American property law during the same period,[76] and another article covers the growth of the law of contract.[77] All of these articles will be incorporated into a book on the changes in American law, from the Revolution to the Civil War, caused by the beginning of the Industrial Revolution. With respect to property, Horwitz demonstrates a development from a gentry-oriented concept of property emphasizing static and undisturbed enjoyment by the owner, to one of dynamism and instrumentalism, emphasizing "the newly paramount virtues of productive use and development."[78]

> At the beginning of the century, property law tended to encourage high risk investment through a doctrine of priority, which conferred exclusive property rights on the first developer. By the middle of the century, however, the law had shifted to a reasonable use or balancing test which allowed newer entrants to compete while destroying the claims that existing property owners had acquired under older legal doctrines.[79]

Horwitz' support for his view seems somewhat weak and will require some sublateral monographic aid, but the thesis is convincing.

Other, noneconomically-oriented areas of law are at last receiving some of their due. This is especially true with respect to criminal law and family law. Furthermore, no fewer than

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[75]Horwitz, "Damage Judgments, Legal Liability, and Economic Development Before the Civil War," to be published in the *American Journal of Legal History.*

[76]Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860,* 40 U. CHI. L. REV. 248 (1973).

[77]Horwitz, *The Historical Foundations of Modern Contract Law,* 87 HARV. L. REV. 917 (1974).

[78]Horwitz, *supra* note 76, at 248.

[79]*Id.* at 290. For good treatment of portions of tort law, see FRIEDMAN & LADINSKY, *supra* note 5; Malone, *The Formative Era of Contributory Negligence,* 41 ILL. L. REV. 151 (1946). A good recent article concerning the history of labor legislation is Schreiber, *The Majority Preference Provisions in Early State Labor Arbitration Statutes: 1880-1900,* 15 AM. J. LEGAL HIST. 186 (1971).

three colleagues are currently at work on the law of slavery: Stanley Katz of the University of Chicago Law School, Daniel Flanigan of the University of Virginia's history department, and Robert Cover at Yale University Law School. A. E. Keir Nash, in a series of articles taken from his dissertation, has argued that blacks received a good deal of fair treatment by some judges on some ante-bellum Southern supreme courts,[80] while an excellent student note discusses the interaction between the conflict of laws and the question of slavery.[81] William Nelson has persuasively argued that the Revolution caused a significant shift in the function of criminal law, from the enforcement of morals to the protection of property and security.[82]

We need to know more about other aspects of criminal law in the nineteenth century, as well as about other legal ways in which people were accorded less than their full rights. More, for instance, ought to be known about Indian law, from both the white man's and the Indian's perspective. Wilcomb Washburn's *Red Man's Land/White Man's Law*[83] is an interesting starting effort that demonstrates the need for a comprehensive treatment of the broken treaties with the Indians, paternalistic treatment by the Government, and legal deprivation, as well as what legal alternatives might have existed for the parties involved. John Phillip Reid has recently completed the first volume of a multivolume treatment of Cherokee tribal law which is excellent and bodes well for the future.[84] A fine article by Joseph C. Burke deals with the difficult political problems presented by the Cherokee cases during the last years of Marshall on the Supreme Court.[85]

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[80]*See* Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64 (1971); Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C.L. REV. 197 (1970); Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Bolton O'Neall*, 21 S.C.L. REV. 141 (1969).

[81]Note, *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74 (1971).

[82]Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U.L. REV. 450 (1967).

[83]W. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW (1971).

[84]J. REID, A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION (1971). The second volume of this work should be completed by the end of this year.

[85]Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969).

In no small part due to the guidance of David Flaherty, a colonialist at the history department of the University of Western Ontario, several good monographs dealing with aspects of family law will soon appear. George Curtis is finishing a dissertation on the juvenile courts of the late nineteenth and early twentieth centuries in Virginia; Suzanne Williams is completing one on "Law and the Family: New York 1700-1850;" and James Deen, whose competence has already been demonstrated in his excellent article on "Patterns of Testation,"[86] is now at work with Stanley Katz on family law in New England from 1800 to 1850. Suzanne Lebsock, currently a graduate student at the University of Virginia, is at work upon the law of divorce and married women's property rights from 1865 to 1900, while Katz is also working on the legal status of women in the nineteenth century. Charlotte Rottier, studying under Bloomfield, is examining the rise of women lawyers in the District of Columbia in the late nineteenth and early twentieth centuries.

### *D. Bench and Bar*

While most previous work on the profession during this period has been anecdotal and thus primary rather than interpretive in nature, excellent histories and biographies are beginning to emerge. Premier work in judicial biography is presented by the studies of Joseph Story by Gerald Dunne,[87] of Lemuel Shaw by Leonard Levy,[88] and of Marmaduke Dent and Charles Doe by John Phillip Reid.[89] These thorough and thoughtful books establish a high standard and provide material that is excellent for classroom use. A similarly high mark for the biography of a practicing lawyer is earned by William Harbaugh with his recently published and first-rate biography of John W. Davis.[90] Since Harbaugh had the distinction of being granted access to Davis' files by his law firm, an opportunity usually not available to biographers of lawyers, this effort effectively portrays all facets of the busy

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[86]Deen, *Patterns of Testation: Four Tidewater Counties in Colonial Virginia*, 16 AM. J. LEGAL HIST. 154 (1972).

[87]G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970). *But see* the excellent partially dissenting review, Bloomfield, *A Man for All Seasons*, 1 REV. AM. HIST. 213 (1973).

[88]L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957).

[89]J. REID, AN AMERICAN JUDGE: MARMADUKE DENT OF WEST VIRGINIA (1968); J. REID, CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE (1967).

[90]W. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS (1973).

and successful twentieth-century corporate lawyer and eminent appellate advocate working for both private and public profit. Maxwell Bloomfield is beginning work on a biography of the noted Jacksonian law teacher, David Hoffman, while James Ely is studying the career of the post-Revolutionary South Carolina jurist, John F. Grimke. Dorothy Hawkshawe, one of Bloomfield's students, is completing a biography of D. Augustus Straker, the noted Negro civil rights lawyer and text writer of the late nineteenth century.

Bloomfield has just finished a volume of essays dealing with the legal profession in the hundred years after the Revolution which, given the quality of his previously published articles, should prove to be incisive and useful. Bloomfield has aptly shown that the bar in Jacksonian times, in conscious response to the barrage of criticism it received, adopted a professionalistic image which it has retained to the present day and which has successfully masked the continuation of many of the attributes and practices vehemently criticized.[91] Another fine, but anonymous, student note argues that the real purpose of Story's *Swift v. Tyson* decision was to protect the legal profession from popular demands, an argument which meshes well with Bloomfield's findings.[92] The sources collected by the late Perry Miller[93] for his sweeping essay on the ethos of the profession between the Revolution and the Civil War[94] are perhaps more useful than the essay itself.[95]

Gerald Gawalt has published two portions of his dissertation on the legal profession in Massachusetts from 1760 to 1840. In "Sources of Anti-Lawyer Sentiment"[96] Gawalt establishes the existence of a lawyer class and thus provides a basis for acceptance of contemporaneous criticism of the bar because of "general dis-

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[91]The volume of essays will be entitled "The Power Brokers: American Lawyers and Social Change, 1776-1876." *See* Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America*, 14 AM. J. LEGAL HIST. 269 (1971); Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306 (1968).

[92]Note, Swift v. Tyson *Exhumed*, 79 YALE L.J. 284 (1969).

[93]THE LEGAL MIND IN AMERICA (P. Miller ed. 1962).

[94]P. MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 99-265 (1965).

[95]*See* Friedman, *Heart Against Head: Perry Miller and the Legal Mind*, 77 YALE L.J. 1244 (1968).

[96]Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts: 1740-1840*, 14 AM. J. LEGAL HIST. 283 (1970).

satisfaction with the restrictive nature of a professional elite—an anomalous development during an era characterized by rising expectations for social, economic, and political democracy.[97] In "Massachusetts Legal Education in Transition"[98] Gawalt demonstrates that the relatively late appearance of the institution of law schools in the Bay State was the deliberate result of the bar's attempt, through fostering apprenticeship training, to regulate and restrict entrance into the profession, to maintain a high standard of quality, and to reduce competition. He concludes that "[t]his dual role of education and regulation led to the failure of both."[99]

### *E. Other Monographs and Studies*

Two model monographs indicate subject matter that should be diligently pursued by American legal history students: Robert Ireland's study of county courts in Kentucky to 1850,[100] and John Guice's treatment of the supreme courts of Colorado, Montana, and Wyoming during their territorial days.[101] Lawrence Friedman is presently at work on a comparison of two California trial courts during the period from 1890 to 1970 and will collaborate with Yale sociologist Stanton Wheeler to study the work of American appellate courts from 1870 to 1970. An interesting article by George Priest,[102] a student at the University of Chicago Law School, demonstrates the value of statistical and economic analysis of legal materials both to provide direct evidence for the use of economic, political, and social historians and to demonstrate the effectiveness of attempted legislative amelioration of social problems. Such a

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[97] *Id.* at 283.

[98] Gawalt, *Massachusetts Legal Education in Transition: 1766-1840*, 17 AM. J. LEGAL HIST. 27 (1973).

[99] *Id.* at 28. For an extensive if uncritical history of American legal education, see Stevens, *Two Cheers for 1870: The American Law School*, 5 PERSPECTIVES AM. HIST. 405 (1971). *See also* A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921); Currie, *The Materials of Law Study*, 3 J. LEGAL ED. 331 (1951).

[100] R. IRELAND, THE COUNTY COURTS IN ANTE-BELLUM KENTUCKY (1972).

[101] J. GUICE, THE ROCKY MOUNTAIN BENCH: THE TERRITORIAL SUPREME COURTS OF COLORADO, MONTANA, AND WYOMING 1861-1890 (1972). For an article on some aspects of the functioning of the same courts, see Bakken, *Judicial Review in the Rocky Mountain Territorial Courts*, 15 AM. J. LEGAL HIST. 56 (1971).

[102] Priest, *Law and Economic Distress: Sangamon County, Illinois, 1837-1844*, 2 J. LEGAL STUDIES 469 (1973).

study of the judgments and executions in Songamon County, Illinois, in the period from 1837 to 1844, indicates the need for substantial revision of previous impressionistic judgments concerning the effects of both the depression of 1937 in Illinois and the attempts by the legislature to afford relief.

Several other important studies are under way which bode well. Willard Hurst, as mentioned above,[103] is devoting his attention to the growth and development of antitrust policy in an attempt to understand "what went on between about 1870 and 1920 in public policymaking to present us with pretty much of a *fait accompli* in economic concentration."[104] I expect that much will be learned therefrom concerning basic ideological and philosophical attitudes toward the proper place of business and economic growth in America. Richard E. Ellis will soon be undertaking a thorough study of the legal problems relating to the Panic of 1819, including relief legislation, usury laws, bankruptcy measures, imprisonment for debt, stay and replevin laws, and banking regulations. And, with the imminent completion of his dissertation entitled "The American Codification Movement: A Study in Ante-Bellum Legal Reform," Charles Cook, a student of Mary Berry at the University of Maryland, will present the first in-depth treatment of one of the topics in our period most in need of attention. Elizabeth Gaspar Brown has forcefully argued that, contrary to the commonly held view, the practice of law on the frontier, at least in Wayne County, Michigan Territory, was conducted in a professional, sophisticated, and competent manner.[105] Concomitantly, two investigations of the immediate post-Revolutionary experience in South Carolina, by James Ely[106] and Leigh Harrison,[107] conclude that a well-trained and conservative bench, bar, and legislature were unmoved by any spirit of revolt against English law on legal institutions. Ely's study of the legislation of the period is particularly imaginative and comprehensive. John Phillip Reid is currently at work

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[103]*See* text accompanying note 33 *supra*.

[104]Letter from Willard Hurst to Wythe Holt, July 25, 1973.

[105]Brown, *Frontier Justice: Wayne County 1796-1836*, 16 AM. J. LEGAL HIST. 126 (1972); Brown, *The Bar on a Frontier: Wayne County, 1796-1836*, 14 AM. J. LEGAL HIST. 136 (1970). *See also* J. BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI (1957).

[106]Ely, *American Independence and the Law: A Study of Post-Revolutionary South Carolina Legislation*, 26 VAND. L. REV. 939 (1973).

[107]Harrison, *A Study of the Earliest Reported Decisions of the South Carolina Courts of Law*, 16 AM. J. LEGAL HIST. 51 (1972).

upon the law on our frontier, particularly the law of overland wagon trains and the law in California mining camps.

Harold Hyman has just published a study subtitled *The Impact of the Civil War and Reconstruction on the Constitution*[108] and is currently continuing his investigation of the legal history of government in the same period, while beginning research on a study of the legal history of American cities. Three of his students are at work upon related topics: Harold Platt is studying the "Legal History of Public Services in Houston, 1850 to the Present"; Edward Weisel has selected "City and State: The Development of Intergovernmental Relations in Nineteenth Century Texas"; and Louis Marchiafava is working on "A Comparative History of the New Orleans and Houston Police Departments."

## III. Chto Nado Dyelat'?[109]

Activity is necessary on two fronts which together comprise the whole of our useful activity as scholars. Some remarks are pertinent concerning research activities that ought to be undertaken; and a large amount of thought and dialogue ought to be devoted to pedagogical methods and tools. We are valuable not only as creators of a relevant past but as transmitters of interesting, scholarly, high-minded, and serious work.

Even accepting my belief in the necessity of adopting a theoretical and philosophical schema, the opportunities for further research are practically limitless. An immediate need exists for Hurst-type studies in other regions of the country in order to test Scheiber's suggestion that the locale of much of the work of the Hurst school—Wisconsin—is not typical of the rest of the country.[110] Moreover, and this is especially true of the South which is severely understudied, other areas will have distinct economic problems which may at least fill out the contours of mainstream history.

Perhaps the most pressing need is for more monographs on a microcosmic level. Quantitative research would be quite helpful at this stage of historiographical development, and, as the Sanga-

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[108]H. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution (1973).

[109]*See* V. Lenin, *What is to be Done?*, in 1 Selected Works 123 (Moscow ed. 1960).

[110]*See* Scheiber, *At the Borderland of Law and Economic Thought: The Contributions of Willard Hurst*, 75 Am. Hist. Rev. 744, 753-56 (1970).

mon County, Illinois, study shows,[111] it is likely that this can only be done at the local level. We need many studies of how local government, and particularly county courts, functioned, both juridically and politically. What did people at the basic level of government perceive the function of their local courts to be? How closely was the ideal followed? What sort of skewing effect did the existence of a more or less organized professional bar have? What substitutes have various segments of society evolved for court-given justice and police-oriented law? How did law serve locally to cement such institutions as the family, the church, or public education? How did law and legal institutions react to depression, war, or oppression?

Concomitantly, the device of biographical study needs to be widely utilized. The Alderman Library at the University of Virginia, for example, has for approximately sixty years contained a rather complete file of papers taken from the small town practice of Allen Caperton Braxton, a brilliant Old Dominion attorney at the end of the Victorian era. He has so far only been viewed as a political figure, never as a practitioner. He was, I think, a rather typical progressive in the mold of those portrayed by Wiebe:[112] a young, well-organized, high-minded, hard-working man clearly aware of the social disjunctions caused by the emergence and immorality of large corporations and willing to spend hundreds of hours, as he did in the 1901-1902 Virginia Convention, drafting the constitutional provisions for a state corporation commission to combat this evil. Otherwise he was rather elitist and conservative in his approach to the "solution" of most contemporary problems.[113] But his mode of attack was that of a lawyer, and his chief and primary concerns arose from and were for his legal practice; he and countless others like him, important in a plethora of local and state issues throughout the nineteenth century, are waiting to be discovered and brought to light. We need to know their backgrounds, the nature of their educations and practices, their impacts upon the community, the bar, and the practice of law and, if possible, their jurisprudential and philosophical views. The

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[111]Priest, *supra* note 102.

[112]*See* R. WIEBE, THE SEARCH FOR ORDER 1877-1920, at 111-63 (1967).

[113]The only treament of Braxton is to be found in V. Weathers, The Political Career of Allen Caperton Braxton, April 22, 1956 (unpublished thesis in Alderman Library, University of Virginia). My dissertation on the Virginia Constitutional Convention of 1901-1902 will treat Braxton's contributions to that body at some length and will attempt to place him more in perspective.

bench, as well as other functionaries, such as masters in chancery, sheriffs, clerks of the court, and members of administrative boards and commissions, should receive similar biographical treatment.

Meanwhile the history of the growth of legal doctrine must continue to receive attention. We especially need to know more about the origins of and changes in tort law and criminal law, and the fields of procedure and jurisdiction have not received the attention due. Specific types of law, such as the poor laws, deserve attention as well. Law during Jacksonian times and especially on the frontier needs more attention, and the period after the Civil War is almost a *tabula rasa* from any point of view. As one can see from the preceding section, it appears that work is currently under way in all of the indicated areas and directions.

What is not clear, however, is that work of a more philosophical and jurisprudential nature is proceeding. To iterate a point made by Hurst many times and defended here, "[l]egal history should be structured about some defensible theories of social structure and processes, so that it is to a substantial extent a sociological history of law and not a history of law as a self-contained field."[114] This implies that the study of legal ideas is important also. Edward White has indicated the direction that some such studies might take by the example of his recent work on legal philosophy in the twentieth century,[115] and Phillip Paludan's work also involves jurisprudential inquiry.[116] Horwitz' article on the conservative style and ideology of nineteenth-century legal writers should stimulate interest.[117] We need to know more about the history of thought, from within and without the profession, about the nature and function of being a lawyer or a judge. We need to know more about the concept and function of legal rules as contemporaneously conceived, for it is my observation that we are most blatantly present-minded in our thinking in this area.[118] We know almost nothing of the history of such an important concept as *stare decisis,* although the recent work of

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[114]Section on Legal History, Association of American Law Schools, Report on the Teachings of Legal History in American Law Schools 58 (1973) [hereinafter cited as Legal History in American Law Schools].

[115]*See* note 27 *supra.*

[116]*See* notes 62, 63 *supra* & accompanying text.

[117]Horwitz, *supra* note 38.

[118]Woodward, *supra* note 43, gives a good warning about this kind of present-mindedness.

Horwitz and Nelson on instrumentalism provides a good starting point.[119] Exactly how did judges, lawyers, or the general populace know what the law was when there were no reports and no codes? Why was it so universally acceptable in colonial times for nonlawyers to sit on the bench, and why did this custom disappear rapidly and simultaneously with the appearance of reporters and with the emergence of the new nation? What, exactly, was a pettifogger? What is the history, at the state level, of the process of having one judge speak for "The Court" rather than allowing all to speak *seriatim*, and why did this change occur? How did the lessening of professional qualifications during Jacksonian times affect the practice of law? What is the relation of rulemaking and judicial rhetoric to the maintenance of the supremacy of the wealthy and the upper middle class? Exactly what ethics, mores, and political purposes were reflected in the adoption of formal codes of ethics at the end of our period? How did the introduction of the large corporate law firm change the lawyer's and the layman's conceptualizations of the task of practicing law? What is the sociology of the adoption of Story's and Langdell's pedagogical revolutions?

Even more attention needs to be given to the teaching of legal history, if only because it is rather abominably taught now. Woodard has ably stated the case.[120] In a forthcoming article I shall argue at greater length that the subjects which ought to be required in a law school's first-year curriculum comprise legal history, legal ethics, legal profession, jurisprudence, Constitutional history, legal bibliography and library usage, and case-parsing rather than the current and time-honored substantive law courses.[121] Legal history should be in the first rank, as it is of first importance in giving students some grasp of the social and ethical context of judicial decision-making, legislative activity, and counseling. Two perceptive comments from the results of the questionnaire submitted by Professor Smith, Chairman of the Section on Legal History of the AALS, are directly on point. According to Professor Opala of the University of Oklahoma, "the legal history teacher must be evangelistic in his approach to persuade students that their ability to use legal materials affords them a potent weapon in both trial and appellate advocacy"[122] and, according to

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[119]Horwitz, *supra* note 36; Nelson, *supra* note 41.

[120]Woodward, *supra* note 15.

[121]*Cf.* Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968).

[122]LEGAL HISTORY IN AMERICAN LAW SCHOOLS 59.

Professor Strickland at the University of Tulsa, legal history, by providing "an in-depth approach to a limited number of problems, interests the student because he can get his teeth into the real considerations of how real people resolved their legal problems."[123]

In developing materials, syllabi, and approaches, we should concentrate on the principles stated by Horwitz in his response to the AALS questionnaire. We should "avoid antiquarianism; use history to raise theoretical, philosophical, and jurisprudential questions; avoid tedious doctrinal or institutional explications; relate legal changes to more general social, economic, or philosophical changes."[124] As Hurst notes in the same source, we should build courses which

> [R]espond to the students' concern with the moral and political legitimacy of the uses of law in society. We seem to be in a generation of law students uncommonly disturbed about the morality of their discipline. Legal history, insofar as it bears on these legitimacy doubts, seems to strike a response in students, even though they may disagree sharply with the value-orientations in the subject as offered by the instructor.[125]

Students are quite interested, as Professor Wise from Wayne State University Law School points out, "in historical examples of the venality of the legal profession and the extent to which law and the lawyers have been the servants of vested interests."[126]

This calls for cross-pollination among legal historians, not only with regard to the introduction of approaches, techniques, evidence, and concerns from other disciplines, but also in the establishment of a clearinghouse whereby we can exchange bibliographies, syllabi, lecture notes and ideas, information concerning work in progress and recent publications, and the like. The newsletter of the American Society for Legal History, edited by Charles Cullen, is a step in the right direction, but it should be amplified and regularized. Further, pedagogy ought to be a regular topic at scholarly meetings, not only for the benefit of new teachers but for the, benefit of us all. We ought to talk seriously and at length about the merits of seminars versus those of lecture courses, about the

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[123] *Id.* at 65.

[124] *Id.* at 58.

[125] *Id.* at 64.

[126] *Id.* at 66.

differences between law students and history students and between graduates and undergraduates, and about various pedagogical techniques that work or do not work. Professor Bridwell of the University of South Carolina, responding to the AALS questionnaire, said that "courses should be taught by persons with sufficient interest and commitment to develop a sound knowledge of the field and the literature pertaining to it."[127] We should not, however, be so selfishly concerned about the laziness of some colleagues, about privacy in matters of lecture notes and publication topics—in short, with competitiveness—that we act counterproductively with regard to our common field and enterprise. Academic selfishness is our worst communal disease and should be stamped out.

The availability of classroom materials is also a significant problem, but, as several teachers noted in the AALS questionnaire, so little has been done to solidify theory, philosophy, and historiography in American legal history, let alone for the nineteenth century, that it is unrealistic to expect wide acceptance of any book of "cases and materials." Friedman's *History of American Law*[128] is a good start towards a classroom text, but, frankly, I find it too idiosyncratic to be used as a basic theme book. I suggest the need for compilations of useful source material and of collections of useful articles patterned along the lines of the book Flaherty has edited for the colonial period.[129] A good substitute is good communication about materials inside our confraternity.

## IV. Conclusion

The study of legal history must be viewed as the study of the history of social change. The researcher and writer in this field must have a philosophy and a general field theory; he must also be deeply skeptical. A good deal of research is currently under way, and there has been recently a relative explosion of publications, but much more needs to be done, and it all needs to be done with more conscious organization. We need more conferences, exchanges, bibliographies, newsletters, and the like, to stimulate and continue the cross-pollination necessary to provide proper growth in our field. Pedagogy—classroom teaching—must be given a prime share of attention.

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[127] *Id.* at 41.

[128] L. Friedman, *supra* note 31.

[129] *See* Essays in the History of Early American Law (D. Flaherty ed. 1969).

# COMMENTS

## SOME THOUGHTS ON THE EMERGING IRREBUTTABLE PRESUMPTION DOCTRINE

RANDALL P. BEZANSON*

In a number of recent cases, the United States Supreme Court has applied a new or reinvigorated doctrine as a principal ground for decision.[1] In simplest form, the doctrine of irrebuttable pre-

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*Assistant Professor of Law, University of Iowa College of Law. B.S.B.A., Northwestern University, 1968; J.D., University of Iowa College of Law, 1971.

[1]Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

The irrebuttable presumption doctrine was employed in the taxation context in the 1920's and early 1930's, but it appears to have become dormant thereafter. *See, e.g.*, Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Comm'n, 284 U.S. 206 (1931); Schlesinger v. Wisconsin, 270 U.S. 230 (1926). The doctrine has since been applied, but in the significantly different context of substantive criminal law. *E.g.*, Leary v. United States, 395 U.S. 6 (1969); Tot v. United States, 319 U.S. 463 (1943).

The case most often cited by the Supreme Court for recent applications of the doctrine is Bell v. Burson, 402 U.S. 535 (1971), in which the Court struck down a Georgia statute providing that an uninsured motorist involved in an accident who was unable to post bond for any resulting damages automatically had his driver's license suspended. Since no hearing on fault was required and fault could not be conclusively presumed in such circumstances, the conclusive presumption established by the statute was fatal to its constitutionality under the due process clause.

The *Bell* case presented the same issues as the later cases discussed in this Article. The Court read the Georgia statute as premised on a purpose to protect faultless victims from judgment proof defendants. With the statutory purpose so construed and limited, it was relatively easy for the Court, relying on procedural due process cases like Goldberg v. Kelly, 397 U.S. 254 (1970), to require a hearing on fault before suspension of a license. But the Court engaged in no analysis of the state's power to enact its suspension scheme irrespective of fault. Such a scheme would seem to be entirely rational, in light of the fact that states can enact compulsory insurance laws.

Thus, the Court avoided analysis of the underlying issues of state power and interest, just as it has done in *Vlandis*, *LaFleur*, and related cases. *See* text accompanying notes 23-26 *infra*. Since the Court avoided such analysis

sumption provides that if a legislative classification is imperfect in that it sweeps either too broadly or too narrowly,[2] the classification violates due process unless the presumption created by the classification is rebuttable.[3] The terminology employed in the application of the doctrine is virtually indistinguishable from that employed in the ordinary equal protection analysis, except that the end result is explained through the application of irrebuttable presumptions.[4] This Article will assess the value and impact of the doctrine in terms of its effectiveness as a principled rule of decision and its impact on the legislative use of classifications.

## I.

The typical restrictions on legislative classification or line-drawing are minimal under the currently accepted equal protection model. In areas of economic regulation or situations in which

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and instead imputed a specific purpose to the statute, the application of *Goldberg* notions, which protect the fairness and accuracy of fact-finding under valid and unchallenged statutory standards, is clear. However, the two steps of imputing purpose and imposing due process standards cannot be separated, for they are integrated parts of a single decisional rule. When viewed in the aggregate, what results is a due process right to seek an exemption from a statutory classification, the rationality and constitutionality of which has never been challenged. *See* text accompanying notes 27-34 *infra;* Vlandis v. Kline, 412 U.S. 441, 465-69 (1973) (Rehnquist, J., dissenting).

[2]The more common terminology employed to describe this condition is overbreadth or under-inclusiveness. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969) [hereinafter cited as *Equal Protection*]; Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). For a discussion of the doctrine's application to under-inclusive classifications, see note 35 *infra*.

[3]In Vlandis v. Kline, 412 U.S. 441 (1973), the Court stated:

> Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go to school there.
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> . . . .
>
> We hold only that a permanent irrebuttable presumption of nonresidence—the means adopted by Connecticut to preserve that legitimate interest—is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of state to demonstrate that they have become bona fide Connecticut residents.

*Id.* at 452-53. *See also* Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791, 799-801 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508, 514 (1973); *id.* at 514-17 (Stewart, J., concurring); Stanley v. Illinois, 405 U.S. 645, 654 (1972).

[4]*See* cases cited note 3 *supra*.

fundamental rights are not impinged by a classification, the fourteenth amendment requires only that a state demonstrate that its classification is drawn in light of legitimate goals and that the classification is a rational means of accomplishing those goals in whole or in part.[5] The standard of rationality or reasonableness of relation between the means employed and the ends sought is not absolute, nor is it determined on the basis of the Court's judgment or value preferences. Rather, the relevant inquiry is whether a reasonable legislator could have concluded that the classification was a rational means of accomplishing or promoting any of the possible goals which might underlie a given statute.[6]

Within this doctrinal framework, the scope of permissible challenge to the relevant statutory classification is severely limited. The challenging party must establish that statutory inclusion of all like-situated persons in a given classification would be irrational under the standard set out above. The challenger is not entitled to argue that while he shares the characteristics of those persons placed within the classification and the classification is rational, particular circumstances germane to his situation alone render the specific application of the statute to him unconstitutional and require a personalized exemption.[7] For example, a state may have a statute which sets the age for legal consumption of alcoholic beverages at eighteen. The relevant questions under equal protection analysis are whether this age limitation is based upon a legitimate state goal, and whether a reasonable legislator, given a legitimate state goal, could believe that restricting drinking to those at or above eighteen years of age is a rational, albeit somewhat arbitrary and certainly imperfect, means of promoting that goal. A mature seventeen year-old would have standing to challenge the statute which disqualifies her from drinking, but only on the ground that the eighteen year age limitation, viewed as a whole with respect to all seventeen year-old persons, is irrational.

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[5]*See, e.g.*, North Dakota St. Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 94 S. Ct. 407 (1973); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

[6]*See, e.g.*, Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Goesart v. Cleary, 335 U.S. 464 (1948). *See also Equal Protection* 1077-84.

[7]This is implicit, of course, in the equal protection standards discussed above. For a fuller development of those doctrines in this context, see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). *See* note 1 *supra*. *Compare* Bell v. Burson, 402 U.S. 535 (1971), *with* Goldberg v. Kelly, 397 U.S. 254 (1970).

The seventeen year-old plaintiff would not be able to challenge the statutory discrimination on the ground that while the eighteen year limitation is generally rational, she is a particularly mature seventeen year-old who, but for her age, possesses characteristics more similar to persons eighteen or nineteen years of age, and thus she should be constitutionally exempted from the classification.

If drinking were a "fundamental" right, however, the relevant constitutional standard of rationality would be more strictly applied, and permissible overbreadth would be significantly limited. The state would not be free to establish a line at eighteen years of age if that line constituted no more than a blunt, albeit rational, instrument for accomplishing its purposes.[8] Rather, more narrowly tailored distinctions relating not to the imperfect indicator of age but rather to a distinction more closely related to the statutory purpose, such as maturity, would be required.[9] An individual challenge, therefore, would be permitted, but the result would be invalidation of the entire classificatory scheme for lack of narrow tailoring. A particularized exemption from the statute would not result.

When the relevant equal protection standard is rationality, the Court is, in effect, abdicating virtually all responsibility for assessing the wisdom or soundness of the social or economic policy underlying the statutory scheme; the choice of the means employed to promote the selected state policy is only lightly scrutinized. While this might result in some degree of arbitrariness on an individual basis, as in the case of the mature seventeen year-old, the individual rights at stake are not deemed significant enough to warrant judicial intrusion, and, in any event, clear statutory language notifying the individual of her obligations satisfies most of the fairness problems involved. If, for example, a state prohibits right turns at red stoplights, everyone is expected to comply or be subjected to the statutory sanction, despite the likelihood that an individual might endanger no one by accomplishing the prohibited right turn when no other cars or persons are near the intersection.

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[8]This would be true, as well, if age were a "suspect" classification. *See Equal Protection* 1122.

[9]A functionally accurate classification, as well, might be stricken if less onerous alternatives were available. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Roe v. Wade, 410 U.S. 113 (1973); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965).

If fundamental rights are affected by the statutory classification, or if the classification is drawn using suspect criteria, equal protection theory permits the Court to substitute its judgment not only with respect to the policy underlying the statute, but also with respect to the means employed to promote that policy. But substitution of judgment under the equal protection clause is limited to particular circumstances involving specific interests or rights given special constitutional protection,[10] and thus the Court is required to articulate its grounds for decision in broad and principled terms.

## II.

The recently employed irrebuttable presumption doctrine must be viewed in the context of the equal protection model set forth above. In many respects, the doctrine represents a retreat from the requirement of articulated values under the equal protection clause. It is noteworthy, for example, that in four cases in which the doctrine of irrebuttable presumption was applied by the Supreme Court in the past three terms, very difficult policy judgments which would have been required under equal protection analysis were avoided. Yet each case was amenable to such analysis.

*Cleveland Board of Education v. LaFleur*[11] presented, under the equal protection mantle, the question which the Court avoided during the 1972 Term:[12] should sex be considered a suspect criterion for classification under the equal protection clause? Pursuant to a rule promulgated by the Board of Education of Cleveland, all pregnant school teachers were required to take a maternity leave without pay beginning five months prior to the ex-

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[10]*See* authorities cited note 9 *supra; Equal Protection* 1121-24.

[11]94 S. Ct. 791 (1974). Mr. Justice Powell concurred in the result and stated in his separate opinion:

> I am also troubled by the Court's return to the "irrebuttable presumption" line of analysis of [*Stanley* and *Vlandis*]. Although I joined the opinion of the Court in *Vlandis* and continue fully to support the result reached there, the present cases have caused me to re-examine the "irrebuttable presumption" rationale. This has led me to the conclusion that the Court should approach that doctrine with extreme care.

*Id.* at 802.

[12]*See* Frontiero v. Richardson, 411 U.S. 677 (1973). The same issue was skirted during the 1971 Term in Reed v. Reed, 404 U.S. 71 (1971).

pected birth of the child. The teacher could not return from maternity leave until the beginning of the next regular school semester following the date when the child attained the age of three months. The Court first addressed the school board's argument that a mandatory leave policy was necessary to assure continuity of instruction and to permit the employment of replacements. Noting that advance notice of departure would serve these ends as effectively as a strict cut-off date, and that a five-month rule would often result in a teacher's departure shortly before the end of a semester, thereby subverting the goal of continuity, the Court concluded that the classification was arbitrary and not rationally related to these asserted interests of the school.[13] The board argued further, however, that the five-month rule was designed to keep physically unfit teachers out of the classroom. The Court did not hold that the rule was irrational in light of this purpose. Rather, the Court stated that even if one were to assume *arguendo* that some women would be physically unable to work past the cut-off date established in the challenged rules, certainly large numbers of teachers would be physically capable of continuing work for longer than the rules allow. Thus, the Court reasoned, "the conclusive presumption embodied in these rules . . . is neither 'necessarily nor universally true' and is violative of the Due Process Clause."[14] Through the application of the irrebuttable presumption doctrine to the classifications embodied in the maternity leave rules, the Court avoided the need to pass on whether such rules are sex-based and violative of the equal protection clause.[15] Absent the irrebuttable presumption approach, however, the Court would have had to pass on the sex discrimination holding, for the Court admitted that the classification in the rules was rational under lenient equal protection standards.

A similar result was reached by the Court during the 1972 Term in *Vlandis v. Kline*.[16] There the Court declared unconstitutional under the due process clause a Connectitcut statute mandating an irrebuttable presumption of nonresidency for purposes of qualifying for reduced tuition rates at a state university. Under equal protection analysis, the question presented was whether the right to travel or the right to education should be held applicable

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[13]94 S. Ct. at 798.

[14]*Id.* at 799.

[15]*See id.* at 802-04 (Powell, J., concurring); *id.* at 804-05 (Rehnquist, J., dissenting).

[16]412 U.S. 441 (1973).

to nonresident tuition standards imposed by state schools, and should thus trigger close scrutiny analysis under the equal protection clause and substantially limit the ability of educational institutions to impose out of state tuition.[17] In the alternative, the relatively lenient scrutiny characteristic of equal protection analysis in areas of economic regulation could have been applied. Since, under this analysis, the Court would have found it difficult to conclude that the Connecticut scheme was irrational,[18] the result would have been to defeat the claim raised by the plaintiff and to sustain the constitutionality of nonresident tuition rates in general. The Court, however, did not address either of these points, but skirted the issues by applying the irrebuttable presumption doctrine. The Court stated that the due process clause forbids denying an individual the resident rates on the basis of an irrebuttable presumption of nonresidence "when that presumption is not *necessarily or universally* true in fact, and when the State has reasonable alternative means of making the crucial determination."[19] The standard which the Court applied in assessing the validity of the irrebuttable presumption or classification scheme was whether the distinctions were "necessarily or universally true in fact". If this standard is not satisfied, conclusiveness will not be permitted under the due process clause.

Two other recent cases have applied the doctrine with similar effect. In *United States Department of Agriculture v. Murry*,[20]

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[17]*See id.* at 454-55 (Marshall, J., concurring). Justice Marshall joined the opinion of the Court, but not insofar as that opinion held permissible a one-year residency requirement as a prerequisite to qualifying for in-state tuition benefits. According to Justice Marshall,

> That question is not presented by this case since here we deal with a permanent, irrebuttable presumption of nonresidency based on the fact the student was a nonresident at the time he applied for admission. . . .
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> . . . .
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> In the absence of full consideration of those equal protection questions, I would leave the validity of a one-year residence requirement for a future case in which the issue is squarely presented.

*Id.* at 455.

[18]*See id.* at 463-69 (Rehnquist, J., dissenting).

[19]*Id.* at 452. The "reasonable alternative means" is the individualized hearing. *See* text accompanying notes 33-34 *infra*.

[20]413 U.S. 508 (1973). *Murry* was clearly a very difficult case, since there was no easily available "fundamental" right on which to base close scrutiny analysis. The majority opinion by Mr. Justice Douglas seems to

the Court was presented with a choice between striking portions of the federal Food Stamp Act by invoking strict scrutiny on the basis of a right to travel or to basic sustenance, and sustaining a "rational," albeit distasteful and occasionally inequitable, statutory scheme under lenient equal protection standards. Both issues were avoided through application of the irrebuttable presumption doctrine. In *Stanley v. Illinois*,[21] the Court was invited to invoke strict scrutiny in assessing a statute which prevented an unmarried father from obtaining custody of his children upon the death of the mother. The Court applied the irrebuttable presumption doctrine under the due process clause, and avoided the need to determine under equal protection analysis whether sex discrimination, discrimination against illegitimates, or fundamental rights of child rearing were involved. The Court reasoned that although it may be that most unmarried fathers are unsuitable parents, and it may be that Stanley is such a father, "all unmarried fathers are not in this category; some are wholly suited to have custody of their children."[22]

The application of the irrebuttable presumption doctrine in these cases has had the following effects. The Court has avoided equal protection analysis which would have presented difficult policy choices regarding the importance and ranking of rights and interests at stake. In each case, however, the Court seems to have been committed to reaching the result which application of the difficult equal protection principles would support, for the

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conclude that under equal protection standards the classification at issue was wholly irrational, but the opinion is, at the same time, firmly rooted in the irrebuttable presumption doctrine. Mr. Justice Stewart, concurring, relied exclusively on the irrebuttable presumption aspect of the case. Mr. Justice Marshall was more forthright and would have applied heightened scrutiny under the equal protection guarantee in the fifth amendment. The dissenters—the Chief Justice and Justices Blackmun, Powell, and Rehnquist—were also more forthright about the equal protection issues although they would have resolved them differently than did Mr. Justice Marshall.

[21]405 U.S. 645 (1972). Mr. Justice White authored the Court's opinion, which was based on both due process and equal protection theory. The Court's opinion came close to noting an express limitation on the irrebuttable presumption doctrine to "cognizable and substantial" private interests, such as child rearing. *Id.* at 652. Reference to similar interests was made in *LaFleur*, 94 S. Ct. at 796. Little, if any, guidance, however, was provided concerning the principled footing or significance of these observations, and, in view of the absence of similar reference in *Murry* and *Vlandis*, the significance of such possible limiting constructions is problematical. *See* note 40 *infra*.

[22]405 U.S. at 654.

plaintiffs were granted relief in each case. The fact that the Court may be now in the process of re-examining and redefining equal protection doctrine[23] provides no justification for the use of a basically unprincipled or unarticulated doctrine by which the Court avoids facing fundamental policy choices but achieves the desired results on a case-by-case basis. The Court, quite simply, is having its cake and eating it too.

## III.

A closer look at the irrebuttable presumption doctrine as a device for resolving constitutional issues raises serious questions about its scope and application. The doctrine is based on the due process clause of the fourteenth amendment, and it partakes of both the substantive and procedural aspects of the due process guarantee. It thus merges the two aspects of due process analysis, yet avoids the most difficult analytical issues presented under each heading.

The irrebuttable presumption doctrine seems to have substantive underpinnings, since it seems to be selectively applied to certain types of cases involving important, yet nonfundamental, rights. *LaFleur* raised the difficult issue of whether sex-based discrimination is constitutionally suspect. *Vlandis* and *Murry* involved arguably new extensions of the right to travel, a matter which the Court may have preferred to leave untouched. *Stanley* was susceptible to analysis in terms of sex discrimination or the fundamental rights of procreation, privacy, or the like. But selective application of the doctrine to these "quasi-fundamental" rights or interests can only be gleaned from what the Court has decided in fact, since the Court has made little effort to distinguish or identify in principle the scope of the doctrine's application.[24] Indeed, the value of the doctrine seems to lie in the fact that it permits the Court to avoid the difficult policy issues raised in the cases.

The device employed to evade the difficult substantive policy judgments is the procedural aspect of the doctrine. Rather than assessing on substantive grounds those situations which would warrant application of a more stringent standard of under-inclus-

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[23]*See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

[24]*See* notes 21 *supra*, 40 *infra*.

iveness or over-inclusiveness[25] in the legislative classification, the Court seemingly adopts the rigid rule that lines must be drawn finely and with precision in all contexts. When fundamental rights are involved, or when discrimination on the basis of suspect criteria exists, current equal protection doctrine would prohibit imprecision even if an opportunity to rebut the classificatory presumption were afforded, unless compelling state interests could be identified which would support imprecision.[26] But in all other areas, the irrebuttable presumption doctrine prohibits inaccuracy in legislative line-drawing. This result is antithetical to the heretofore broad powers given to legislatures to draw imperfect lines when only economic or nonfundamental interests were at stake.

## IV.

Every statutory classification involves a presumption within the meaning of the irrebuttable presumption doctrine. Most statutes contain classifications which differentiate between those persons or things subject to the statutory disqualification and those not subject to it. A vast number of such statutes—perhaps most—involve conclusive or irrebuttable presumptions or distinctions.[27] For example, assume that a state has enacted a statute which requires all trucks weighing more than 8,000 pounds to use heavy duty tires. The purpose of the statute might be that any tire supporting more than 1,800 pounds should be heavy duty in order to assure highway safety at highway speeds. Should a trucker whose vehicle weighs 8,100 pounds, with 6,000 pounds of displacement on the rear tires, be constitutionally entitled to challenge the statute on the ground that it fails to permit him to rebut the admittedly rational legislative attempt to promote highway safety? Neither of the front tires on the trucker's vehicle support 1,800 pounds, and thus the conclusive presumption that four tires are needed to

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[25]*See* note 35 *infra* for a discussion of the doctrine's application to underinclusive classifications.

[26]*See* notes 8, 9 *supra* & accompanying text.

[27]Examples abound. For example, most regulatory statutes relating to the jurisdiction of regulatory agencies or to safety or health requirements contain irrebuttable presumptions. So also do most statutes relating to traffic safety and control, to age qualifications, whether for drinking, marriage, voting, or holding public office, *cf.* Oregon v. Mitchell, 400 U.S. 112 (1970), or to the availability of various forms of welfare. *See* Dandridge v. Williams, 397 U.S. 471 (1970). Indeed, in light of the irrebuttable presumption doctrine, and more particularly the *Murry* case, one might seriously question the current efficacy of the *Dandridge* holding.

insure safety in light of the state's purpose is neither "necessarily nor universally true." Should a person whose truck weighs 8,000 pounds but who drives it exclusively in the city at less than highway speeds also be entitled to challenge the statute?

The irrebuttable presumption doctrine, applied fully, could invalidate all such classifications and require that opportunity always be provided for individualized exemptions from the statute.[28] The challenge, moreover, would be in the form of individualized determinations of whether the legitimate purposes of the statute or rule would require its application to a given case.[29] The ramifications of the doctrine in this context are immense. The first ramification of the irrebuttable presumption doctrine raises fundamental issues regarding the function and form of law. As Justice Rehnquist recounts in his dissenting opinion in *LaFleur*, the evolution of Anglo-American law has basically been from law in the form of individualized determinations, with no codification of legal principle or notice to those affected, to "a relatively uniform body of rules enacted by a body exercising legislative authority . . . ."[30] The *sine qua non* of legislation or codification is the drawing of distinctions and lines, and the functional benefits of

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[28]A possible distinction could be drawn between the application of the irrebuttable presumption doctrine in *LaFleur* and its application to state traffic laws, for example. A state's prohibition on right turns at red stoplights would be subject to the irrebuttable doctrine if the underlying purpose were to promote safety. *See* text accompanying notes 9-10 *supra*. This is because the prohibition on right turns is neither "necessarily nor universally" consistent with traffic safety. However, if the state's purpose were to insure uniform adherence to certain minimal rules of the road, or if it were based on a compelling need for certainty as an end in itself, the irrebuttable presumption might be "necessarily or universally" true.

This exercise of broadening the state purpose in order to satisfy the irrebuttable presumption standard of absolute accuracy fits the traffic safety situation nicely. But it fits the pregnancy leave regulation situation as well, for similar purposes based on need for certainty as an end in itself can be constructed in that context as well. The distinction, if one exists, would be based instead on an evaluation of the importance of the right sought to be vindicated, the significance of the state's interests, and the need for narrow tailoring in light of these factors. The irrebuttable presumption doctrine, however, avoids the equal protection-type analysis implicit in this approach and specifically declines to require the narrow tailoring which results therefrom. *See* note 40 *infra*.

[29]*See* text accompanying notes 32, 33 *infra*.

[30]94 S. Ct. at 805; *id.* at 802 (Powell, J., concurring). *See* J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 2-13, 19-21, 45-46, 57-58, 99-111, 290-302 (1971).

this form of law relate primarily to avoidance of individualized determinations. This approach is manifested in current equal protection doctrine, whether lenient or close scrutiny is applied. In neither instance are individualized determinations resulting in individual exemptions from the challenged classification permitted.[31] The irrebuttable presumption doctrine, in significant respects, constitutes a rejection of this approach to lawmaking, for it requires significant resort to individualized determinations without regard to the nature of a state's interest or the countervailing interests at stake.

The second ramification of the doctrine relates to the form and consequence of rebuttal which must be permitted. How would one argue that the presumption should be inapplicable in one's situation? The *LaFleur* opinion stated that the pregnant teachers must be able to offer evidence to demonstrate that they were able to continue teaching without harm to the fetus or to students and without unduly burdening the school's staffing needs.[32] This would require, initially, an identification of all the possible purposes of the relevant statute or rule. In the context of the *LaFleur* case, this could be a difficult and time-consuming task. Simply identifying the many possible purposes is often an arduous process, and evaluating their legitimacy and relevance to the particular situation could be even more troublesome. The next step in rebutting the presumption would be to argue that an individual's particular situation falls without the scope of legislative purposes and that disqualification under the statute or rule, therefore, would fail to serve the articulated policies. This task could easily

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[31]This is true, as well, of the void for vagueness doctrine. Individualized determinations are antithetical to the values embodied in this approach, which requires clear notice of proscribed conduct, and results, when such notice is lacking, in constitutionally mandated redrafting of the relevant law on clearer and narrower grounds. *See* Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). This result tends inescapably toward law by rule rather than law by exception or ad hoc determination.

Even the procedural due process cases, such as Goldberg v. Kelly, 397 U.S. 254 (1970), stop short of a due process right to statutory exemptions. Rather, the due process theory underlying *Goldberg* is based on the need for accurate and fair application of the statutory terms. If the individual is found, after a hearing, to fall within the statutory language—absent a challenge to the statute on its face or as applied—the inquiry is complete; no exemption, despite the statute's clear language, will result. *See, e.g.*, Goldberg v. Kelly, *supra;* Greene v. McElroy, 360 U.S. 474 (1959).

[32]94 S. Ct. at 798, 799 & n.13, 801. *See* Stanley v. Illinois, 405 U.S. 645, 657 n.9 (1972).

become time consuming and would often involve the introduction of complex evidence, expert opinion, and the like.

The most serious consequences raised by the irrebuttable presumption doctrine, however, do not relate to its inefficiency as a lawmaking tool. Indeed, one might well conclude that the benefits of the doctrine are substantial enough to outweigh the costs of inefficiency, for the individualized scrutiny required by the doctrine constitutes a very effective means of tempering the consequences of lenient scrutiny under the equal protection clause when only economic or nonfundamental rights are at stake. Upon closer analysis, however, it becomes evident that the benefits of such a procedure to the individual are questionable.

Under the *LaFleur* opinion, the burden can be squarely placed on the individual.[33] While the Court in *LaFleur* declared the pregnancy leave regulations unconstitutional, it is by no means clear that even greater disqualifications from teaching because of pregnancy could not be imposed if the regulations were repromulgated with rebuttable rather than conclusive presumptions. For example, the *LaFleur* opinion did not hold that a pregnant teacher could not be forced to stop teaching five or even seven months before term, nor that such a rule, if it contained a rebuttable feature, would not be constitutional. Assume, for example, that a teacher who is three months pregnant is required by rule to stop teaching. That rule is not facially invalid or even suspect if she can challenge its application in her case. However, in order to successfully challenge the application of the rule to her, she must rebut the school's particularized need, which in her case might be an inability to find a replacement immediately rather than after eight months of pregnancy. Assume, in the alternative, that a teacher is pregnant at the end of a given semester and will give birth four or five months later, at or near the end of the coming semester. The *LaFleur* opinion suggests strongly that the school, in order to assure continuity of teaching in the classroom, could require removal at the end of the semester preceeding term,

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[33]94 S. Ct. at 799 & n.13, 801; *see* Stanley v. Illinois, 405 U.S. 645, 655-57, 657 n.9 (1972). This allocation of the burden of proof follows implicitly from the irrebuttable presumption doctrine, since under it, the rationality, and thus constitutionality, of the statute, absent the irrebuttable presumption, is assumed. Thus, the challenger would have the burden of demonstrating an unconstitutional application of a presumptively constitutional statute in the particular circumstances presented.

whether that point be two, five, or more months into pregnancy.[34] This result not only follows from the language of the opinion itself, but from the fact that the Court avoided identifying and resolving the underlying principles and policies in the context of conventional equal protection analysis.

Implicit in the conclusion that the benefits of the irrebuttable presumption doctrine will be illusory to the individual is the further conclusion that application of the doctrine will legitimize overbreadth in statutory classifications. The ultimate result of the irrebuttable presumption doctrine's application will be to permit overly broad[35] statutes to remain on the books, tempered in their

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[34]94 S. Ct. at 797-98, 799-800. Indeed, this conclusion flows directly from the scope of the Court's holding, which strikes the regulations because of the irrebuttable presumptions rather than because of their irrationality. As long as a regulation drawn along these lines contains a rebuttable feature, nothing in the opinion suggests that it would be constitutionally infirm. *See id.* at 803 (Powell, J., concurring). The majority opinion, moreover, explicitly recognized continuity of classroom teaching as a legitimate goal, *id.* at 798, as did Mr. Justice Powell's concurring opinion, *id.* at 803.

[35]None of the cases decided under the irrebuttable presumption doctrine has expressly dealt with the doctrine's application to under-inclusive classifications. Indeed, since application of the irrebuttable presumption doctrine results in an individualized exclusion from a statutory classification, one would expect that individualized challenges to exclusion from (as opposed to inclusion in) classifications would be rare. Exclusion from a classification ordinarily means avoidance of a disability imposed on those falling within the group defined by the classification. For example, the eighteen year-old age limitation for drinking may well be under-inclusive as well as over-inclusive if the purpose of the limitation is to restrict drinking to those persons mature enough to make rational judgments about alcohol. This classification would be over-inclusive because some sufficiently mature seventeen year-olds would be disabled from drinking. It would be under-inclusive because some immature nineteen year-olds, for example, would be permitted to drink. The immature nineteen year-old, however, is unlikely to challenge his or her inclusion in the classification which encompasses persons over seventeen years of age.

If, however, the statutory classification is under-inclusive, and those persons included within it are granted benefits rather than deprived of them, a request for individualized inclusion in (as opposed to exemption from) the classification under the irrebuttable presumption doctrine might arise. For example, if a statute designed to provide hospitalization benefits for those persons most in need were enacted, and under the statute an income level for qualification in the program were set at $3,500.00, a person having ten dependents and making $3,600.00 might well argue that the irrebuttable presumption that persons making less than $3,500.00 were in need would not be "necessarily or universally" true. Accordingly, the person making $3,600.00 and having ten dependents could seek an individualized inclusion within the under-inclusive statutory classification despite the clear language of the

impact only by an opportunity to rebut the presumptions or classifications contained within them. Under the decided cases, reenactment of the stricken rule is constitutional so long as the presumptions contained therein are rebuttable.

With the demise of *Lochner v. New York*,[36] it was generally felt that, in most areas of state legislation, overbreadth, even if accompanied by irrebuttable classifications or presumptions, was acceptable within generous bounds of rationality.[37] Only selected areas relating to fundamental rights under the Constitution, such as the right to free speech, needed the greater protection afforded by a requirement that statutory classifications be accurately drawn and narrowly tailored to further important state interests. With respect to legislation which, in purpose or effect, burdened those rights or classified on the basis of suspect criteria, precision in the relationship between the legislative classifications and the necessary and legitimate ends of the state was required.[38]

It is conceivable, however, that the irrebuttable presumption doctrine will be employed as an expeditious line of retreat from the substantial protections afforded such fundamental rights by the Court. Indeed, the four recently decided cases manifest such a view; in each the Court retreated from the fundamental rights analysis which has characterized equal protection law for the past twenty years, fell back upon the irrebuttable presumption doctrine to obtain the result which the Court felt necessary, and thus avoided consideration of the central issue. The consequence

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statute and despite the rationality and constitutionality of the classificatory scheme. In such an instance, the irrebuttable presumption doctrine would seem to require the claimant's inclusion in the under-inclusive classification. Of course, the same scheme can be viewed in reverse, with the statutory classification establishing an over-inclusive classification consisting of those *not* entitled to benefits. Thus, the same claimant could challenge his or her inclusion in a classification consisting of persons deprived of benefits on the ground that the classification is over-inclusive because, in light of the statutory purpose, the classification includes persons who should not be deprived of benefits. So viewed, an exemption from the classification would then be possible under the irrebuttable presumption doctrine as applied in the over-inclusive context. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

[36]198 U.S. 45 (1905).

[37]*See, e.g.*, Vlandis v. Kline, 412 U.S. 441, 465-69 (1973) (Rehnquist, J., dissenting); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949); *Equal Protection* 1077-84; Ely, *supra* note 7.

[38]*See* notes 8-9 *supra* & accompanying text.

of *LaFleur*, for example, will be to permit statutes or rules to remain on the books which arguably discriminate on the basis of sex—a result which would not be permitted under equal protection analysis if such discrimination were deemed suspect. Discriminatory statutes based on illegitimacy, as in *Stanley*, or those which affect fundamental rights of procreation and child-rearing, such as the pregnancy leave regulations in *LaFleur*,[39] will also remain on the books in arguably over-inclusive form, the only caveat being that specific applications of the statute will be subject to scrutiny. Thus, sex discrimination, for example, will be officially condoned. Only those wise enough or bold enough to challenge the statute's application will receive the full benefit of their constitutional rights. Notice to others will be illusory at best. If the Court is disatisfied with the harsh and often inequitable effect of "lenient" equal protection scrutiny, surely a better solution would be to require greater precision on the face of the statute or rule.[40]

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[39]94 S. Ct. at 796.

[40]*See* Gunther, *supra* note 23.

While the possible future evolution of the irrebuttable presumption doctrine is beyond the scope of this Article, at least two possible doctrinal developments exist. First, as Mr. Justice Powell surmised in his concurring opinion in *LaFleur*, 94 S. Ct. at 802, the selective application of the doctrine in the cases discussed in this Article may simply indicate that the Court is applying disguised equal protection analysis. Insofar as the result reached under the irrebuttable presumption doctrine—retention of the statute but the granting of an exemption—is different from that reached under equal protection analysis, however, this is not a fully satisfactory explanation. *See* text accompanying notes 27-32 *supra*.

Another possible evolution of the irrebuttable presumption doctrine might be a reformulation of Justice Harlan's due process analysis. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting); Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970); *cf.* United States v. Kras, 409 U.S. 434 (1973). Justice Harlan's due process approach embodied an evaluation of whether a "basic liberty" was involved, but the identification of such a right did not involve an assessment of the legitimacy of state goals to the degree required under the equal protection clause. And a basic liberty did not, as in equal protection, virtually end the constitutional inquiry. Rather, it was a first step in an analysis largely devoted to an evaluation of the means selected by the state to accomplish its purpose and a consideration of the possibility that less restrictive alternatives might exist. In some respects, this formulation approximates the irrebuttable presumption doctrine, with its emphasis on means and de-emphasis on legitimacy of ends and absolute ranking of rights. The difference remains, however, in that even under Justice Harlan's formulation individualized exemptions were not permitted; rather elimination or mitigation of statutory overbreadth was required.

In light of *Broadrick v. Oklahoma*,[41] a recent case in which the Court narrowed the circumstances in which facial challenges to statutes on first amendment grounds would be permitted, it may not be farfetched to speculate that overly broad statutes affecting first amendment rights will similarly be permitted to remain on the books, subject to a citizen's procedural right to a determination in advance whether prospective action would be constitutionally proscribed by the statute. Such a prediction is surely not inconsistent in principle with either *LaFleur* or *Broadrick*, and it is the practical result accomplished under the approach of both cases.

## V.

The consequence of the irrebuttable presumption doctrine is twofold. First, while the doctrine seems to have accomplished the desired result in the decided cases, further analysis suggests strongly that the protections afforded the rights at stake in those cases were illusory. Although the challenged statutes or rules were stricken, the insertion of a procedural device for challenging the statute will permit the prior statutory distinctions to be re-enacted. Second, the doctrine can be viewed as manifesting the Court's conclusion that, for example, pregnancy leave regulations do not constitute sex-based discrimination, but rather discrimination based on functional factors unrelated to sex. Thus, striking the statute under equal protection analysis would not be warranted, since, absent invidious sex discrimination or a burden on fundamental rights, a rational basis under the equal protection clause would clearly exist. Through the doctrine of irrebuttable presumption, however, the Court avoids having to decide the sex discrimination issue, yet the Court can reach a conclusion seemingly consistent with the view that pregnancy leave policies are sex-based and violative of the equal protection guarantee. The doctrine permits the Court to avoid analysis of the important policy issue, but to decide the particular case in a manner satisfactory to it.

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The more relevant line of cases in light of the exemption characterized by the irrebuttable presumption doctrine is the procedural due process cases dealing with hearing rights. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). But *LaFleur*, *Murry*, *Vlandis*, and *Stanley* do not deal extensively with this line of cases. This is appropriate for the procedural due process cases present significantly different issues, rest on significantly different theories, and reach significantly different results than Bell v. Burson, 402 U.S. 535 (1971), *Stanley*, *Vlandis*, *Murry* or *LaFleur*. *See* note 1 *supra*.

[41] 413 U.S. 601 (1973).

As a device of doctrinal restraint, the irrebuttable presumption doctrine is thus much more appealing than such devices as standing, mootness, ripeness, abstention, and the like, for those jurisdictional doctrines do not permit the Court to pass on the merits of the case. So viewed, the irrebuttable presumption doctrine is very dangerous. Not only are its limitations unclear, and its possible applications unsettling, but, more significantly, the doctrine serves as a device which permits the Court to make decisions on the basis of the "equities" without the restraint imposed by neutral principle.

# CONVICTS AND THE CONSTITUTION IN INDIANA

NILE STANTON*

## I. INTRODUCTION

A decision of nearly landmark dimension, affecting Indiana corrections, has been rendered by the United States District Court for the Northern District of Indiana. In *Aikens v. Lash*[1], the federal court put an abrupt halt to various Department of Correction abuses of prisoners' constitutional rights.[2] The Indiana Department of Correction (DOC) has, in general, run roughshod over the rights of inmates and directly precipitated lengthy and costly litigation by stubbornly refusing to voluntarily acknowledge those rights. In view of *Aikens*, it should be clear to the DOC that, despite past omniscient presumptions to the contrary, its policies and procedures are not immune from judicial inquiry.[3]

## II. THE AIKENS CASE

For the convenience of the parties and witnesses, and to make possible any court inspection of prison facilities or proceedings, the visitors lounge in the Administration Building of the Indiana State Prison was converted into a courtroom for the *Aikens* trial.

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*Executive Director, Indianapolis Lawyers Commission. B.S., Ball State University, 1965; M.A., Ball State University, 1969; J.D., Indiana University, 1973. The views expressed herein are the author's and should not be construed as those of the Lawyers Commission.

[1]No. 72-S-129 (N.D. Ind., Jan. 23, 1974).

[2]In Cruz v. Beto, 405 U.S. 319, 321 (1972), the United States Supreme Court declared that "[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners."

[3]Until the last decade, courts generally refused to review prisoner allegations of mistreatment, *viz.* a "hands-off" doctrine was invoked to avert judicial eyes from the policies and practices used by prison administrators. *E.g.*, Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951); Golub v. Krimsky, 185 F. Supp. 783 (S.D.N.Y. 1960); *see* J. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS § 4.2 (1973); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). The doctrine was seriously eroded by Monroe v. Pape, 365 U.S. 167 (1961), which held that exhaustion of state remedies was not a condition precedent to federal jurisdiction to hear a claim brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), and completely dispelled by Cooper v. Pate, 378 U.S. 576 (1964). *See generally* Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 55 VA. L. REV. 841 (1971).

For ten long days, trial was held on four issues—the class[4] of inmates contended that (1) they were deprived of due process of law by disciplinary transfers from the Indiana Reformatory to the Indiana State Prison where, upon arrival, they were kept in seclusion for at least thirty days; (2) they were deprived of various constitutional rights when they were kept incarcerated in "I" Cellhouse Detention Unit (IDU) for more than sixty continuous days without adequate exercise and recreation, medical services, doctor-prescribed special diets, sanitary and nutritional food, opportunity and equipment for personal and environmental cleanliness, access to an adequate law library, and literature which did not pose a clear and present danger to prison security; (3) they were deprived of various constitutional rights when they were kept in the Deputy's Office Segregation Unit (D.O. Seclusion) for more than thirty continuous days with deprivations similar to, but more pronounced than, those in IDU; and (4) their rights under the first, sixth, and fourteenth amendments to the United States Constitution were infringed by the prison officials' practice of opening, reading, censoring, copying, stopping, and otherwise interfering with mail sent between prisoners and attorneys.[5] Obviously, more was at issue in *Aikens* than four simple and independent claims.

### *A. Censorship of Attorney-Inmate Mail*

On October 22, 1973, at the close of all the evidence, one issue was summarily disposed of in favor of the plaintiffs: The court ordered that "attorney and client must have a free opportunity to communicate by mail and that opportunity must not be encumbered by the chilling effect of [censorship]."[6] The free flow of attorney-inmate mail was subjected to one narrow limitation. If prison authorities have "reasonable grounds" to believe that a piece of attorney-inmate mail contains contrabrand, then, and only then, may an official open that piece of mail. Even then, however, the opening must be made in the "immediate presence of

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[4]The vast majority of "prison law" cases have been maintained as class actions pursuant to federal rule 23(a)(1), as was *Aikens*. Jurisdiction is normally invoked under 28 U.S.C. §§ 1331, 1343(3)-(4), 1361, 2201, 2202 (1970); and nearly all such litigation is based upon 42 U.S.C. §§ 1983-85 (1970), the Civil Rights Act of 1871. *See generally* Note, *Prisoners Rights Under Section 1983*, 57 GEO. L.J. 1270 (1969).

[5]Aikens v. Lash, No. 72-S-129, at 5-7 (N.D. Ind., Jan. 23, 1974).

[6]*Id.* at 8.

the inmate involved"[7] and the mail delivered over to the inmate promptly and without any reading, censoring, copying, or other interference.

Relying on the Seventh Circuit's decision in *Adams v. Carlson*,[8] the district court in *Aikens* found that there had been no showing that attorney-inmate mail had posed any threat to the order or security of the prison, and the court posited its bar to censorship on that finding. Had Warden Lash been able to prove that there had been intermittent, if not frequent, security threats created by attorney-inmate communications, the court would have very likely refrained from imposing such an insurmountable[9] bar to censorship.

It is true that attorney-inmate communications are closely related to the fundamental right of access to the courts.[10] And the *Aikens*-type bar will, perhaps, lead to a more candid discussion between inmates and attorneys of matters relating to convictions and prison abuses. Sixth amendment considerations, however, do not automatically require an *Aikens*-type prohibition.[11] The court

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[7] *Id.* (original emphasis).

[8] 488 F.2d 619, 632 (7th Cir. 1973). "[P]rison authorities may not restrict the exercise of constitutional rights by those in their charge without showing a threat to the order or security of their institution."

[9] What constitutes "reasonable grounds" for prison officials to believe that attorney-inmate mail contains contraband? If a package activates the metal-detector or a dog trained to find drugs reacts to the smell of an item of mail, "reasonable grounds" would certainly exist. However, it is doubtful that a lesser indicia of the probable presence of contraband could meet any viable constitutional standard, such as the standard imposed by *Aikens*. *See* Marsh v. Moore, 325 F. Supp. 392 (D. Mass. 1971), in which the court enjoined censorship and opening of attorney-inmate mail since inspection for physical contraband could be accomplished with a fluoroscope, metal-detector, or by manual manipulation.

[10] *Ex parte* Hull, 312 U.S. 546 (1941), established that inmates have a fundamental right of unfettered access to the courts. As was noted in Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973):

> The judiciary . . . has not been content merely to keep free the lines of communication between the inmate, the courts, and agencies of correction. Whether as a vital concomitant of the prisoner's right to petition the bench or as a distinct requirement of his right to effective counsel guaranteed by the Sixth Amendment, a right of access by an inmate to counsel has been perceived . . . .

*Id.* at 630. *See* Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972); J. PALMER, *supra* note 3, at §§ 3.2 to 3.3.1.

[11] *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972), which held that prison officials could open and read

did not explain why it concluded that access to the courts was "chilled" by censoring or copying mail. Abuses of first and fourteenth amendment rights "chill" attorney-client dialogue,[12] and, although such abuses were not detailed in the *Aikens* decision, the DOC has such a distinct proclivity for such abuses[13] that the sweeping attorney-inmate right to correspond freely, and the concomitant onus placed upon prison officials, was certainly justified.

### *B. Disciplinary Transfers*

Disciplinary transfers to the prison from the reformatory, made without benefit of prior due process hearings, were carefully scrutinized by the *Aikens* court.[14] Until mid-1972, no inmates were afforded any hearings on proposed disciplinary transfers.[15] After July 1, 1972, potential transferees were allowed two-stage hearings[16] until new DOC regulations became effective on August 27, 1973. Hearings were allowed pursuant to the new regulations, but neither these nor the earlier hearings afforded the full panoply of procedural due process guarantees.[17]

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attorney-inmate mail but could not delete anything from such letters or refuse to forward them.

[12]Fox, *The First Amendment Rights of Prisoners*, 63 J. CRIM. L.C. & P.S. 162, 171-80 (1972). *See generally* Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87 (1971).

[13]For example, an attorney wrote to an inmate at the Indiana State Prison and in that letter made remarks which were critical of a certain federal district court judge. A prison official opened that letter, made photocopies of it, and mailed it to several persons, including the federal judge who had been criticized. Receipt of the photocopied attorney-inmate letter was testified to by that judge at the *Aikens* trial.

[14]No. 72-S-129, at 8-17.

[15]*Id.* at 8.

[16]*Id.* at 9.

[17]In the two-stage hearing, potential transferees would first appear before the reformatory's Conduct Adjustment Board (CAB); and, if the CAB recommended transfer, a hearing was held before the Classification Committee. Although a prisoner could object to the proposed transfer, he could neither present witnesses in his behalf nor cross-examine his accusers, and he could not have assistance of counsel or a lay advocate. *Id.*

The new regulations also failed to allow the above procedural safeguards. *Id.* Although these regulations specifically sanctioned "transfer to another institution" upon conviction of a major violation, the DOC euphemistically stated that such transfers were not "disciplinary action." Indiana Department of Correction, Regulation 2-04, "Adult Authority Policy Regarding Institutional Discipline," Aug. 27, 1973 (mimeograph). "At the conclusion of

With respect to disciplinary transfers, the threshold question was whether inmates suffered grievous losses as a result of the transfers. For, if a practice can inflict such a loss upon any citizen,[18] that practice must comport with certain standards of procedural fairness.[19] The *Aikens* court found that each transferee was in fact subjected to a "grievous loss"[20] and, therefore, balanced the interests of the state with those of the prisoners to ascertain what process was due.[21] Carefully extracting appropriate legal principles from two recent Seventh Circuit decisions, *Adams v. Carlson*[22] and *United States ex rel. Miller v. Twomey*,[23] and prudently taking into consideration recent United States Supreme Court rulings,[24] the *Aikens* court—after making an exception for

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any disciplinary action, . . . an inmate may be reviewed . . . to determine if any change in assignment is appropriate. This process shall not be considered a disciplinary action or a punishment." *Id.* at 7. The Aikens court found the difference "wholly one of semantics. By whatever name they [the disciplinary transfers] are called, the loss to the prisoner is equally grievous." No. 72-S-129, at 8.

[18]*See* Cruz v. Beto, 405 U.S. 319, 321 (1972).

[19]*See* Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[20]No. 72-S-129, at 12, 15-16. The "grievous loss" was the "prolonged segregated confinement" at the prison to which each disciplinary transferee was subjected. The *Aikens* court also took cognizance of the fact that the parole board took records of disciplinary transfers into account in making its decision as to whether parole should be granted. *Id.* at 11. *See* United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), which interpreted Morrissey v. Brewer, 408 U.S. 471 (1972), to require "that due process precede any substantial deprivation of the liberty of persons in custody." 479 F.2d at 713.

[21]No. 72-S-129, at 12-13. The state's interests were to have effective prison administration, to maintain legitimate prison functions, such as custody, and, most importantly, to obtain rehabilitation of the prisoners.

[22]488 F.2d 619 (7th Cir. 1973). "What a prisoner suffers upon segregation . . . differs from what he suffered upon conviction by shades of degree, not of kind. That the prisoner is convicted by an administrative prison board instead of a court makes no significant difference." *Id.* at 627.

[23]479 F.2d 701, 713 (7th Cir. 1973).

[24]Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

emergency situations[25]—set forth "minimal due process standards"[26] to be applied to all disciplinary transfers.

The minima required by *Aikens* are these: 1) adequate and timely advance written notice that a transfer is contemplated, which notice must include a statement of the reason for the proposed transfer,[27] 2) an impartial hearing tribunal, which may consist of one or more institutional personnel but may not include the accuser, one who has investigated the case, or one who has been involved in the recommendation for transfer, 3) a fair opportunity for the inmate to explain his conduct, *i.e.*, to appear and speak in his own behalf,[28] 4) a fair opportunity to confront and cross examine adverse witnesses and to call witnesses in his own behalf,[29] 5) representation by a lay advocate,[30] 6) a written copy of a statement of findings of fact and conclusion, based on sub-

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> In a true emergency situation, one wherein the general security of the institution is immediately threatened, a disciplinary transfer . . . may be allowed without a prior notice and hearing, provided, however, that where such emergency transfer is effected, the transferred inmate must be given a hearing within five days of the date of his arrival at the transferee institution . . . .

No. 72-S-129, at 16.

[26]*Id.* Minimal standards required by the Seventh Circuit in *Miller* for internal disciplinary hearings were much less exacting. *See* 479 F.2d at 718. However, the *Miller* court admonished that "in the end we may simply transplant the *Morrissey* requirements." *Id.* at 718 n.37.

[27]Notice must be given not less than two days before the hearing and must state the time and date of the hearing. No. 72-S-129, at 1 (N.D. Ind., Order of Feb. 8, 1974).

[28]This fundamental indicia of fairness was, shockingly, denied on occasion. *See* T. Crowder, Three Years in Solitary: Prison Letters of Thomas Crowder 29 (AFSC Pamphlet, Feb. 1973). Crowder was a named plaintiff in the *Aikens* case, and his pamphlet should be read by everyone concerned about Indiana prison practices and their impact upon inmates.

[29]Contrary to a requirement of *Miller*, 479 F.2d at 718, DOC policy did not allow any "fair opportunity" to call witnesses. Regulation 2-04, *supra* note 17, at 1-2. In *Adams*, the court of appeals observed that "a 'fair opportunity' can scarcely be said to exist if prison authorities were predisposed to deny any request for witnesses." 488 F.2d at 629 n.17.

[30]Warden Lash had allowed attorneys to represent inmates in internal disciplinary hearings, until new Regulation 2-04, *supra* note 17, at 1, was adopted.

stantial evidence, and, 7) administrative review by the Commissioner of Corrections or his designate. The court opined that these minimal safeguards were "reasonable and feasible and . . . would present no problems to the administration of the institutions involved."[31] The procedural requirements were made fully retroactive,[32] and the DOC was ordered to provide due process hearings within ten days to all prisoners who were in segregation at the state prison due to a disciplinary transfer.

Although most courts have not required due process hearings prior to disciplinary transfers,[33] the requirements imposed by *Aikens* were necessitated by the severe losses which transferees suffered. Therefore, it would not be improper for due process hearings to be disallowed if the losses were eliminated or made much less severe. For example, after the recently funded training-treatment programs[34] are in progress at the prison, reformatory officials could cease the hearings if, upon their arrival at the prison, inmates were not segregated and no record of the disciplinary transfer were presented to the parole board. If it is deemed necessary to subject a particular inmate to a "grievous loss" upon transfer, that inmate, of course, would be entitled to a timely *Aikens*-type hearing.

The portion of the *Aikens* decision which set forth the due process standards noted above immediately gave rise to some very important questions: Are the inmates who have been transferred from camps, work release, or study release programs back to the reformatory or prison entitled to *Aikens*-type hearings? Since the court noted that internal disciplinary proceedings normally result in the same types of deprivations as did disciplinary transfers, must the full panoply of *Aikens* due process rights also be afforded in the purely internal disciplinary proceedings? Both

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[31]No. 72-S-129, at 17.

[32]*Id.*, *relying on* 488 F.2d at 625-29, in which the Seventh Circuit, in *Adams*, detailed why the *Miller* requirements were fully retroactive.

[33]*E.g.*, United States *ex rel.* Thomas v. Bookbinder, 330 F. Supp. 1125 (E.D. Pa. 1971); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971). *But cf.* Matthews v. Hardy, 420 F.2d 607 (D.C. Cir. 1969), which required that numerous safeguards be afforded prior to transfer from a prison to a mental hospital.

[34]Reference is made to the $450,000 Law Enforcement Assistance Administration grant which will fund joint DOC - Ivy Technical College training programs.

questions must be answered "Yes."[35] Is it of any consequence that an inmate pleaded guilty to an offense which resulted in a grievous loss? No.[36] Other questions which arise from this portion of the judgment should also be liberally resolved in favor of the inmates unless an emergency situation exists or no important inmate right or interest is at stake.

### *C. Cruel and Unusual Punishment*

Until the *Aikens* decision, the prison confined some inmates in "strip cells" in the maximum security segregation unit, D.O. Seclusion. These cells had a commode and a wash basin, but nothing else. There were no windows and no lights. There was no bed. Mattresses, when they were delivered at all, were given to inmates in the late afternoon and taken back each morning. Sometimes the inmates were taken out to shower and shave once a week, but at other times the interval between showers was several weeks. If the inmates got noisy, chemical mace was sprayed at them, and then the solid doors were closed to trap the gas with the inmates.[37] Several courts have found such treatment to be violative of the prohibition against cruel and unusual punishment.[38] *Aikens,* however, went far beyond a simple holding that "strip cell" abuses constituted legally impermissible conduct. For the

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[35]A transfer from work release or study release to either the reformatory or prison results in a much more stringent type of custody. Indeed, such a transfer is quite analagous to a probationer's or parolee's becoming a prisoner; it is, therefore, of paramount importance that the releasee be afforded the same sorts of procedural safeguards to which probationers and parolees are entitled in revocation proceedings. *See* Russell v. Douthitt, 304 N.E.2d 793 (Ind. 1973), in which the Supreme Court of Indiana mandated that a "regular full-blown trial" be afforded prior to revocation of parole.

With respect to the internal prison disciplinary hearings, the *Aikens* guarantees must be afforded since the "grievous loss" at stake is precisely the same severe loss to which disciplinary transferees were subjected and since the state's interest remains constant. Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971). *See* J. PALMER, *supra* note 3, at ch. 7; Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing,* 31 MD. L. REV. 27 (1971).

[36]Unless an inmate who pleaded guilty was properly advised of his rights and waived them, a finding of guilt was not proper since a waiver of constitutional rights cannot be presumed. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969); Brimhall v. State, 279 N.E.2d 557, 564 (Ind. 1972).

[37]No. 72-S-129, at 26. T. Crowder, *supra* note 28, at 27-28.

[38]*E.g.*, Knuckles v. Prasse, 435 F.2d 1255 (3d Cir. 1971), *aff'g* 302 F. Supp. 1036 (E.D. Pa. 1969); Hancock v. Avery, 301 F. Supp. 286 (M.D. Tenn. 1969); *see* J. PALMER, *supra* note 3, at § 4.3.2.

first time in the nation's history, the totality of conditions in an adult penal institution's maximum segregation unit were found to inflict cruel and unusual punishment.[39] Not only did *Aikens* condemn the prison's "strip cells"—the entire D.O. Seclusion was ordered closed within twenty days.

In past years, D.O. Seclusion was called "'Death Row." It was where prisoners were confined to await electrocution. The cells were relatively large. Cells had windows at the back, but these were sealed by solid metal plates which kept out fresh air and sunlight. In the small entryways between the iron-bar cell doors and solid-wood outer doors were single light bulbs. The cells were normally "hot and damp, as well as dingy and dark."[40] Most cells had cot-type beds. The flushing of commodes and sinks was controlled, in first floor cells, by guards outside the cells. These and other conditions led experts to conclude that D.O. Seclusion afforded the worst incidents to incarceration they had ever witnessed anywhere in the nation.[41] Yet, due to the infinite wisdom of some Indiana DOC officials about rehabilitative[42] processes, some prisoners were kept in D.O. Seclusion for years.

The *Aikens* court applied the cruel and unusual punishment test established in *Jackson v. Bishop*,[43] *i.e.*, whether the punishment in question offended "contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess."[44]

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[39]No. 72-S-129, at 28.

[40]*Id.* at 25.

[41]One expert, testifying about D.O. Seclusion, opined:

> It is about the worst I have seen any place. It is a mess. It ought to be torn down. . . . I would tear it out as a question of public safety. A man that goes through that and then is put on the streets is a danger to the public. . . . D.O. Seclusion, as it is operating now, is not for men; it is for animals.

*Id.* at 27. Another expert witness, Lawrence A. Carpenter, testified:

> It is one of the worst units, if not the worst housing unit, I have ever seen in 30 years of prison work in visiting scores of prisons around this country. It could be called a "dungeon" except that it is not subterranean, but it might as well be subterranean because there is no daylight coming in there. . . .

*Id.* *See generally* T. Crowder, *supra* note 28.

[42]IND. CONST. art. 1, § 18: "The penal code shall be founded on the principles of reformation, and not of vindictive justice."

[43]404 F.2d 571 (8th Cir. 1968).

[44]*Id.* at 579.

And the Seventh Circuit standard, as enunciated in *United States ex rel. Miller v. Twomey*,[45] was considered: In *Miller*, it was opined that the eighth amendment could be violated either by "the intentional infliction of punishment which is cruel or by such callous indifference to the predictable consequences of substandard prison conditions that an official intent to inflict unwarranted harm may be inferred."[46] Utilizing these principles in *Aikens*, Judge Grant held that the "totality of conditions" in D.O. Seclusion violated the eighth amendment's prohibition against cruel and unusual punishment.[47] The *Aikens* court found conditions in D.O. Seclusion to be "shockingly inhumane" and "abhorrent to any efforts at rehabilitation" and to "threaten the sanity of the inmates . . . ."[48] As indicated earlier, Judge Grant ordered the segregation unit closed within twenty days.

### *D. The Law Library*

In *Johnson v. Avery*,[49] a 1969 United States Supreme Court decision, it was held that if inmates are not provided with adequate legal services, prison officials cannot forbid a "jailhouse lawyer" from rendering legal assistance to other inmates. Two years later, in *Younger v. Gilmore*,[50] the Court greatly extrapolated from *Johnson* when it affirmed, per curiam, a lower court decision which held that it was a denial of access to the courts for states to restrict prison law libraries from having an adequate supply of useful law books. Subsequent cases have held that *Gilmore* must be construed to impose an affirmative obligation upon states to purchase and make readily available to inmates good prison law libraries.[51]

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[45]479 F.2d 701 (7th Cir. 1973).

[46]*Id.* at 719-20. *See* Furman v. Georgia, 408 U.S. 238, 271-74 (1972) (Brennan, J., concurring).

[47]No. 72-S-129, at 28.

[48]*Id.* at 28-29. *See* W. Webb, Anatomy of a Prison Rebellion 6-9, Nov. 1973 (mimeograph) (on file in the *Indiana Law Review* office).

[49]393 U.S. 483 (1969), a decision criticized by Chief Justice Arterburn of the Supreme Court of Indiana in 17 RES GESTAE, Aug. 1973, at 10.

[50]404 U.S. 15 (1971), *aff'g per curiam.* Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970); *see* J. PALMER, *supra* note 3, at § 6.6.

[51]*E.g.*, Hooks v. Wainwright, 352 F. Supp. 163 (M.D. Fla. 1972); Morales v. Schmidt, 340 F. Supp. 544 (W.D. Wis. 1972).

Upon observing that prisoners confined in IDU and D.O. Seclusion were refused access to any of the state prison's law books and that the "scanty" law library itself was "wholly inadequate,"[52] Judge Grant, in *Aikens,* followed recent guidance afforded by the Seventh Circuit[53] and held that the inmates' "right to access to adequate legal materials" had been "seriously infringed." Accordingly, on February 8, 1974, the *Aikens* court ordered the prison to "maintain a law library for prisoner use which shall contain current editions, having the latest available advance sheets, supplements, and pocket parts of [various legal materials]."[54] And it was directed that inmates in segregation be accorded access to the library and advised of its manner of operation.[55]

## III. Conclusion

In the *Aikens* decision, Judge Grant left two issues unresolved, at least temporarily. The court ruled against plaintiffs on their various constitutional challenges against IDU segregation, but the court retained jurisdiction and indicated that it might review those challenges after the 1974 Indiana General Assembly had a chance to act on the problems.[56] Hope was expressed that "an aroused citizenry and an enlightened legislature" would recognize and act upon "the crying needs of our Indiana prison system."[57] Some of the gross abuses which the *Aikens* trial and decision brought to light could be prevented, or at least ameliorated, by providing the DOC with more staff—guards, doctors, psychiatrists, and counselors. But the General Assembly has not acted.

The other major issue left unresolved was that pertaining to censorship of literature. The court retained jurisdiction and will issue a supplementary decision on that point after the United States Court of Appeals for the Seventh Circuit renders an opinion

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[52]No. 72-S-129, at 29.

[53]Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973):

> Along with the recognition of a prisoner's right of access to the courts has come the realization that a prisoner must have access to legal materials, particularly where he is unable to retain counsel and must petition the courts *pro se.*

*Id.* at 632. *See* Knell v. Bensinger, No. 72-1788, at 5 (7th Cir., Nov. 6, 1973).

[54]No. 72-S-129, at 3 (N.D. Ind., Order of Feb. 8, 1974).

[55]*Id.*

[56]No. 72-S-129, at 23-24.

[57]*Id.* at 24.

in a case which it has reheard en banc.[58] Censorship of literature at the state prison is not as serious as other problems, of course. The censorship practices are, however, rather silly. Literature which poses a "clear and present danger" to the operation of the prison should be prohibited, but what useful purpose is served by banning *Playboy*?[59] And what purpose was served by prohibiting Thomas Crowder from saving a copy of his pamphlet, which consists of letters that went out of the prison after being censored? Perhaps a new legal principle should be developed: Whenever state agents act sober and serious and under the guise of security while doing things which, in addition to being unneeded, are fickle and funny, but sometimes infuriating, and which action under such guise tends to elicit judicial chuckles, those state agents should not be allowed to exercise authority over other human beings. In a word, silliness should not be tolerated when it affects the constitutional rights of those who cannot, lawfully, escape the silliness.

The *Aikens* decision exorcized some cruel abuses. It demonstrated that too many Indiana citizens have for too long ignored what happens inside the walls of the state's penal institutions. And the decision was solidly based on established law. Hopefully, one *Aikens* will be enough. The DOC will survive the shame, and it should finally begin to take affirmative action to avoid more and to help those who are in its care.[60]

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[58]Morales v. Schmidt, No. 72-1373 (7th Cir. 1973). *See* J. PALMER, *supra* note 3, at §§ 3.7-.9.

[59]The magazine is not barred from the Indiana Reformatory, which has a more liberal or, at least, a more consistently applied censorship standard and therefore has fewer problems about censorship.

[60]As one court suggested, "[O]ne function [of the penal system] is to try to rehabilitate the law breaker by convincing him of the validity of our legal system. There is little chance that such an objective will be achieved if prisoners are entrusted to those who likewise break the law by denying prisoners their basic constitutional rights." Sostre v. Rockefeller, 312 F. Supp. 863, 876 (S.D.N.Y. 1970), *rev'd in part sub nom.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).

# NOTES

## EFFECTIVENESS OF COUNSEL IN INDIANA: AN EXAMINATION OF APPELLATE STANDARDS

An accused's right to counsel constitutes a fundamental principle in the American scheme of justice.[1] An essential corollary embodied in that right is the requirement that counsel render adequate, not just perfunctory, assistance to his client.[2] This

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[1]Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932); Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920); Webb v. Baird, 6 Ind. 13 (1854).

A defendant in a criminal trial has a right to have any attorney of his own choice if he is financially able to employ such attorney. If he is not financially able to do so, the court has a duty to select a competent attorney for him at public expense. Fitzgerald v. State, 254 Ind. 39, 257 N.E.2d 305 (1970); State v. Minton, 234 Ind. 578, 130 N.E.2d 226 (1955); Bradley v. State, 227 Ind. 131, 84 N.E.2d 580 (1949). Thus an indigent does not have the right to counsel of his own choosing. State v. Irvin, 291 N.E.2d 70 (Ind. 1973); Burton v. State, 246 Ind. 197, 204 N.E.2d 218 (1964); McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947). Such selection is wholly within the sound discretion of the trial court and reviewable only for abuse of discretion. State *ex rel.* Brown v. Thompson, 226 Ind. 392, 81 N.E.2d 533 (1948); Schuble v. Youngblood, 225 Ind. 169, 73 N.E.2d 478 (1947); State *ex rel.* Shorter v. Allen Super. Ct., 292 N.E.2d 286 (Ind. Ct. App. 1973).

[2]As early as 1925, the Indiana Supreme Court noted in Castro v. State, 196 Ind. 385, 147 N.E. 321 (1925):

> And mere perfunctory action by an attorney assuming to represent one accused of crime which falls short of presenting the evidence favorable to him and invoking the rules of law intended to prevent conviction for an offense of which the accused is innocent, or the imposition of a penalty more severe than is deserved, should not be tolerated.

*Id.* at 391, 147 N.E. at 323. In Powell v. Alabama, 287 U.S. 45 (1932), the United States Supreme Court emphasized that when due process requires the appointment of counsel, "that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of *effective* aid in the preparation and trial of the case." *Id.* at 71 (emphasis added).

right to effective counsel is guaranteed by the Indiana Constitution, article 1, section 13, and by the United States Constitution, sixth amendment, as applied to the states through the fourteenth amendment.[3] Recent cases expanding the right to counsel to "every critical stage of a criminal prosecution,"[4] liberalized rules for postconviction relief, and more diligent enforcement of the code of professional ethics increase the likelihood that criminal appellants in Indiana will seek to reverse their convictions on the ground of incompetency of counsel.

This Note will examine the grounds upon which Indiana appellants have based their incompetency challenges and the standards which Indiana courts have utilized to evaluate these charges. Possible modifications of those standards will be discussed in light of recent federal decisions which may help effectuate the high principles of zealous representation demanded of a responsible legal community.

## I. Standards of Effectiveness

Indiana courts have imposed a heavy burden upon any appellant who seeks to reverse his conviction on grounds of incom-

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[3]Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969); Johns v. Overlade, 122 F. Supp. 921 (N.D. Ind. 1953); Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969); Blincoe v. State, 243 Ind. 387, 185 N.E.2d 729 (1962); Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954); Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1943); Hartman v. State, 292 N.E.2d 293 (Ind. Ct. App. 1973).

[4]*See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964) (custodial interrogations); Kirby v. Illinois, 406 U.S. 682 (1972); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967) (lineups); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963) (trial); Mempa v. Rhay, 389 U.S. 128 (1968) (sentencing); Douglas v. California, 372 U.S. 353 (1963) (appeal); *In re* Gault, 387 U.S. 1 (1967) (juvenile proceedings).

Indiana has long held that an accused is entitled to counsel not only at the time of trial, but also to consult with counsel "at all stages of the proceedings." Lloyd v. State, 241 Ind. 192, 170 N.E.2d 904 (1960); State v. Lindsey, 231 Ind. 126, 106 N.E.2d 230 (1952); Hoy v. State, 225 Ind. 428, 75 N.E.2d 915 (1947); State *ex rel.* White v. Hilgemann, 218 Ind. 572, 34 N.E.2d 129 (1941); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920). Moreover, note that prior to *Argersinger*, Indiana, at least in principle, made no distinction between felonies and misdemeanors with respect to the

petency or ineffectiveness of counsel. A presumption exists that defense counsel in a criminal proceeding has fully and competently discharged his duties.[5] An appellant must present "strong and convincing proof" to overcome this presumption.[6] Specifically, he must prove that his attorney's acts or omissions made the proceedings a "farce," "mockery of justice," or "shocking to the conscience" of the appellate court.[7] In making its final determination, the reviewing court will look to the "totality of the circumstances."[8] An appeal based on inadequate representation, therefore, may not rest upon a mere mistake in judgment on a certain aspect of the trial, but must consider pretrial preparation, the handling of the trial, and the necessary steps for appeal.[9]

While it is the duty of an attorney, whether appointed or retained, to represent his client fully and adequately, utilizing reason-

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right to counsel. *See* Bolkovac v. State, 229 Ind. 294, 299, 98 N.E.2d 250, 253 (1951).

[5]Payne v. State, 301 N.E.2d 514, 516 (Ind. 1973); Kelly v. State, 287 N.E.2d 872, 874 (Ind. 1972); Shuemak v. State, 254 Ind. 117, 121, 258 N.E.2d 158, 160 (1970); Langley v. State, 250 Ind. 29, 37, 232 N.E.2d 611, 615, *cert. denied*, 393 U.S. 835 (1968); Schmittler v. State, 228 Ind. 450, 467, 93 N.E.2d 184, 191 (1950); Wilson v. State, 291 N.E.2d 570, 573 (Ind. Ct. App. 1973).

[6]Conley v. State, 284 N.E.2d 803, 808 (Ind. 1972); Isaac v. State, 274 N.E.2d 231, 237 (Ind. 1971); Hathaway v. State, 251 Ind. 374, 379, 241 N.E.2d 240, 243 (1968); Dowling v. State, 233 Ind. 426, 431, 118 N.E.2d 801, 804 (1954); Lenwell v. State, 294 N.E.2d 643, 646 (Ind. Ct. App. 1973).

[7]Haddock v. State, 298 N.E.2d 418, 420 (Ind. 1973); Robbins v. State, 274 N.E.2d 255, 258 (Ind. 1971); Johnson v. State, 251 Ind. 17, 23, 238 N.E.2d 651, 655 (1968); Shack v. State, 249 Ind. 67, 80, 231 N.E.2d 35, 44 (1967); Harrison v. State, 292 N.E.2d 612, 613 (Ind. Ct. App. 1973); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972). *See also* United States v. Izzi, 385 F.2d 412, 413 (7th Cir. 1967); Lunce v. Overlade, 244 F.2d 108, 110 (7th Cir. 1957); Pelley v. United States, 214 F.2d 597, 602 (7th Cir. 1954), *cert. denied*, 348 U.S. 915 (1955).

[8]Lowe v. State, 298 N.E.2d 421, 422 (Ind. 1973); Blackburn v. State, 291 N.E.2d 686, 696 (Ind. 1973); State v. Irvin, 291 N.E.2d 70, 73 (Ind. 1973); Sargeant v. State, 299 N.E.2d 219, 222 (Ind. Ct. App. 1973).

[9]Johnson v. State, 251 Ind. 17, 23, 238 N.E.2d 651, 655 (1968); Brown v. State, 248 Ind. 11, 15, 221 N.E.2d 676, 679, *cert. denied*, 387 U.S. 925 (1966), *rehearing denied*, 389 U.S. 891 (1967); Stice v. State, 228 Ind. 144, 152, 89 N.E.2d 915, 918 (1950).

able skill and diligence, the law does not require perfection.[10] Thus the failure of a lawyer to claim for his client every possible legal advantage does not constitute inadequacy of counsel.[11] Nor is the mere fact that another attorney might have conducted the defense differently sufficient to require a reversal.[12] Thus, poor strategy, bad tactics, honest mistakes in judgment, mere carelessness, or inexperience do not necessarily amount to ineffective representation.[13] Most clearly, an unfavorable result alone does not amount to a denial of the right to competent counsel.[14]

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[10]Calhoun v. United States, 454 F.2d 702, 703 (7th Cir. 1971), *cert. denied*, 405 U.S. 1019 (1972); Conley v. State, 284 N.E.2d 803, 808 (Ind. 1972); Bays v. State, 240 Ind. 37, 50, 159 N.E.2d 393, 399 (1959), *cert. denied*, 361 U.S. 972 (1960); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972). As the court in Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956), observed:

> The mere fact that greater skill might have been employed by counsel or looking in retrospect, that better judgment or discretion might have been employed is not incompetency, since no professional man has absolute skill, perfect judgment or foresight.

*Id.* at 504, 135 N.E.2d at 250.

[11]Bays v. State, 240 Ind. 37, 50, 159 N.E.2d 393, 399 (1959), *cert. denied*, 361 U.S. 972 (1960); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972).

[12]Blackburn v. State, 291 N.E.2d 686, 696 (Ind. 1973); Callahan v. State, 247 Ind. 350, 356, 214 N.E.2d 648, 652 (1966); Wagner v. State, 243 Ind. 570, 579, 188 N.E.2d 914, 919 (1963); Groover v. State, 239 Ind. 271, 280, 156 N.E.2d 307, 311 (1959); Hendrickson v. State, 233 Ind. 341, 344, 118 N.E.2d 493, 495 (1954).

[13]Lowe v. State, 298 N.E.2d 421, 422 (Ind. 1973); Isaac v. State, 274 N.E.2d 231, 237 (Ind. 1971); Johnson v. State, 251 Ind. 17, 23-24, 238 N.E.2d 651, 655 (1968); Brown v. State, 248 Ind. 11, 15, 221 N.E.2d 676, 679, *cert. denied*, 387 U.S. 925 (1966), *rehearing denied*, 389 U.S. 891 (1967); Haley v. State, 235 Ind. 333, 340, 133 N.E.2d 565, 568 (1956).

[14]Blackburn v. State, 291 N.E.2d 686, 696 (Ind. 1973). The court's statement in DeBruler v. State, 247 Ind. 1, 210 N.E.2d 666 (1965), is illustrative of the disdain expressed by courts toward a defendant who loses and then claims incompetency of his counsel:

> So long as a counsel is competent, clients must either choose to represent themselves or be represented by an attorney skilled in such proceedings. They cannot have their cake and eat it. They cannot take the benefits of counsel's services if they win and then reject the services if they lose.

*Id.* at 4, 210 N.E.2d at 668.

Since the appellant has the burden of establishing incompetency of counsel by a preponderance of the evidence,[15] he must present a sufficient record to permit an intelligent review of the issue.[16] Appellant's testimony at the postconviction hearing standing alone, even though uncontradicted, may not be sufficient to establish incompetency of his counsel.[17] When appellant's trial attorney testifies at or submits an affidavit at the hearing,[18] Indiana courts have given strong credence to the attorney's allegations that he conducted himself in a proper and competent manner.[19] Failure of an appellant to produce the testimony of his trial attorney may raise an inference that the attorney would

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[15]IND. P.C.R. 1, § 5 states: "The petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence."

[16]State v. Irvin, 291 N.E.2d 70 (Ind. 1973); Johnson v. State, 293 N.E.2d 532 (Ind. 1972); Burns v. State, 255 Ind. 1, 260 N.E.2d 559 (1970). Appellant should also make the trial transcript a part of the record. Harrison v. State, 292 N.E.2d 612 (Ind. Ct. App. 1973); Miles v. State, 284 N.E.2d 551 (Ind. Ct. App. 1972).

[17]Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950). In Finger v. State, 293 N.E.2d 25, 27 (Ind. 1973), the court held that appellant's uncontradicted affidavit was largely "conclusive and opinionative" and did not relate to matters of which the State could have any knowledge. *But see* Johns v. State, 227 Ind. 737, 742, 89 N.E.2d 281, 283 (1949) (Emmert, J., dissenting); Schmittler v. State, 228 Ind. 450, 471-72, 93 N.E.2d 184, 192-93 (1950) (Emmert, C. J., dissenting). In *Schmittler*, Judge Gilkison also dissented:

> The fact that the state made no effort to produce this evidence when it was its duty and within its power to do so raises the presumption that had it done so this evidence would have been against the state and would have corroborated appellant's statement.

*Id.* at 484, 93 N.E.2d at 197-98.

[18]The client waives the attorney-client privilege once he places the professional integrity and competency of his counsel into issue. Moore v. State, 231 Ind. 690, 111 N.E.2d 47 (1953); Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947).

[19]State v. Irvin, 291 N.E.2d 70, 73 (Ind. 1973); Kelly v. State, 287 N.E.2d 872, 874 (Ind. 1972); Canan v. State, 242 Ind. 576, 578-79, 179 N.E.2d 746, 747 (1962); Moore v. State, 231 Ind. 690, 693-94, 111 N.E.2d 47, 48 (1953); Harrison v. State, 292 N.E.2d 612, 613 (Ind. Ct. App. 1973). Even when the attorney is unable to clearly recall the specifics of his representation, the court may still find adequacy of counsel. *See* Haddock v. State, 298 N.E.2d 418, 419 (Ind. 1973).

not have corroborated the defendant.[20] But when an attorney supports appellant's allegations, the court is likely to place great reliance upon his testimony.[21]

When an appellant fails to disclose counsel's specific errors and actual prejudice due to such errors, he has not provided sufficient evidence of incompetency.[22] Furthermore, in determining whether appellant made such charges in good faith, the court will take into account any delay by appellant in pressing the incompetency charge.[23] However, mere procedural errors in the presentation of such challenge may not prevent the consideration of a fundamental constitutional issue such as the right to effective counsel.[24]

Aside from the attorney's particular acts or omissions in the case at hand, Indiana courts have frequently considered a number of additional, although not decisive, factors in determining the

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[20]Conley v. State, 284 N.E.2d 803, 807 (Ind. 1972); Schmittler v. State, 228 Ind. 450, 467, 93 N.E.2d 184, 190 (1950). However, Chief Justice Emmert in a strong dissent in *Schmittler* suggested this view is contrary to precedent and wholly fallacious. He argued that since the attorney's interest in protecting his professional reputation would have made him an adverse witness, the State's failure to produce the attorney raised an inference that appellant's allegations were true. *Id.* at 474, 93 N.E.2d at 194. Similarly, Judge Gilkison in dissent wrote: "I cannot imagine a case in which a party is required to place his adversary or his adversary's witnesses on the stand." *Id.* at 485, 93 N.E.2d at 198.

[21]Shack v. State, 249 Ind. 67, 231 N.E.2d 35 (1967). Similarly, when the State admits that the defendant had not received a fair trial, a finding of incompetency is likely. *See* Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956).

[22]Spight v. State, 248 Ind. 287, 226 N.E.2d 895 (1967); Wallace v. State, 247 Ind. 405, 215 N.E.2d 354 (1966); Willoughby v. State, 247 Ind. 210, 214 N.E.2d 169 (1966); Carraway v. State, 236 Ind. 45, 138 N.E.2d 299 (1956); Haley v. State, 235 Ind. 333, 133 N.E.2d 565 (1956).

[23]*In re* Sobieski, 246 Ind. 222, 204 N.E.2d 353 (1965); *In re* Lee, 246 Ind. 7, 198 N.E.2d 231 (1964); Jennings v. State, 297 N.E.2d 909 (Ind. Ct. App. 1973).

[24]Johns v. State, 227 Ind. 737, 749, 89 N.E.2d 281, 285-86 (1949) (dissenting opinion); Wilson v. State, 222 Ind. 63, 78, 83, 51 N.E.2d 848, 854, 856 (1943). However, recent cases indicate that the increasing caseload of the appellate courts may necessitate greater care by appellate attorneys in conforming to procedural requirements. *See, e.g.*, Haddock v. State, 298 N.E.2d 418, 420 (Ind. 1973); Lipps v. State, 254 Ind. 141, 145, 258 N.E.2d 622, 625 (1970).

competency of defense counsel, including the attorney's legal qualifications, the nature of the case, and the method by which counsel was selected. First, courts often look to counsel's legal qualifications, including his experience, education, admission to the bar, and reputation in the legal community. An attorney's widespread legal experience generally,[25] or as a defense counsel or judge in criminal trials specifically,[26] strengthens the reviewing court's presumption of counsel's competency. On the other hand, the court may consider an attorney's substantial lack of experience in criminal defense work as one factor contributing toward his incompetency.[27] Counsel's graduation from a reputable law school[28] and admission to practice in the state where the accused was tried also reinforces this rebuttable presumption of competency,[29] but

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[25]Sweet v. Howard, 155 F.2d 715, 718 (7th Cir. 1946), *cert. denied,* 336 U.S. 950 (1949) (forty years of legal practice, service as president of bar association, and favorable comment on his legal abilities by the Indiana Supreme Court); United States v. Hartenfeld, 113 F.2d 359, 362 (7th Cir. 1940) (thirty-six years of legal practice).

[26]Moore v. State, 231 Ind. 690, 693, 111 N.E.2d 47, 49 (1953); Sargeant v. State, 299 N.E.2d 219, 221 (Ind. Ct. App. 1973) (tried between two and three hundred criminal jury cases); Wilson v. State, 291 N.E.2d 570, 572 (Ind. Ct. App. 1973). In Canan v. State, 242 Ind. 576, 580, 179 N.E.2d 746, 748 (1962), the court noted that twelve members of the bar had testified as to the competency of defendant's attorney and as to his experience in criminal matters.

[27]In Shack v. State, 249 Ind. 67, 75, 231 N.E.2d 35, 42 (1967), the court, in finding counsel incompetent, noted that he had graduated from law school six years previously, but emphasized that he had spent only five percent of his practice in criminal matters, had participated in only one criminal jury trial, and had never prepared a homicide case before. But in Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941), the court stressed that counsel's youthfulness and inexperience alone did not constitute incompetency:

> There is a rather well-defined recollection on the part of the court, backed by our observations, that all lawyers must have their first cases, that in said first case diligence and anxious effort are often quite the equivalent of experience. . . . [A young inexperienced counsel] may, therefore, give his client full, valuable and vigorous service, which will compare favorably with that which his more experienced and better established brethren of the Bar render.

*Id.* at 992-93.

[28]Fluty v. State, 224 Ind. 652, 661, 71 N.E.2d 565, 569 (1947); Wilson v. State, 291 N.E.2d 570, 572 (Ind. Ct. App. 1973).

[29]Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941). *See also* cases cited note 5 *supra.* Courts often note that the defense attorney has been ad-

when an out-of-state attorney appears on behalf of defendant, no such presumption arises.[30] Certainly, when counsel misrepresents himself as an attorney at law, defendant has been denied effective representation.[31]

Secondly, Indiana courts have considered the nature of the case in terms of its difficulty,[32] severity of the charges, and the

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mitted to the state bar. *See, e.g.*, Casey v. Overlade, 129 F. Supp. 433, 434 (N.D. Ind. 1955); Moore v. State, 231 Ind. 690, 693, 111 N.E.2d 47, 48 (1953). In Fluty v. State, 224 Ind. 652, 661, 71 N.E.2d 565, 569 (1947), the court additionally observed that counsel had been admitted to practice before the federal district court, the circuit court of appeals, and the United States Supreme Court. *But see* Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954):

> It is not sufficient just to appoint one who has been admitted to the bar, but it must be an attorney who not only has the ability to defend but one who has a determined will to defend, and "Never to reject, from any consideration personal to himself, the cause of the defenseless or oppressed."

*Id.* at 34, 123 N.E.2d at 183.

[30]In Lunce v. State, 233 Ind. 685, 687-88, 122 N.E.2d 5, 6 (1954), *cert. denied*, 349 U.S. 960 (1955), Judge Emmert in dissent noted that counsel, who was from Ohio and not a member of the Indiana bar, had submitted a motion for a new trial which totally failed to comply with Indiana rules and had grossly failed to discharge his duties as a lawyer. He suggested that if any presumption should be drawn, it should be that an out-of-state attorney "is not qualified to take the grave duty of safeguarding the legal and constitutional rights of his clients." The Seventh Circuit adopted Judge Emmert's views in Lunce v. Overlade, 244 F.2d 108, 109-10 (7th Cir. 1957), finding that counsel was so ignorant of Indiana law and procedure that it was virtually impossible for him to protect defendant's rights. However, in Isaac v. State, 274 N.E.2d 231, 237 (Ind. 1971), the court held that out-of-state counsel, contrary to defendant's allegations, had conducted a vigorous and effective defense.

[31]In Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956), defense "counsel," a bail bondsman, falsely represented himself to be an attorney at law to both defendant and to a local practicing attorney who assisted in the defense only on the day of the trial. *See also* CODE OF PROFESSIONAL RESPONSIBILITY, Canon 3 (unauthorized practice of law).

[32]Fairly cursory conduct by defense counsel may be adequate when the defense position is untenable. As Chief Justice Arterburn concluded in Lowe v. State, 298 N.E.2d 421, 422-23 (Ind. 1973): "In our view, there are, realistically speaking, some cases that just cannot be won simply because the evidence and witnesses against an accused are so overwhelming as to approach irrefutability. This is just such a case." Similarly, in Groover v. State, 239 Ind. 271, 156 N.E.2d 307 (1959), many witnesses observed defendant shoot his estranged wife in the back as she departed from church. Given the diffi-

personal characteristics of the defendant. When a black, poor, young, ignorant, or foreign defendant has been charged with a serious crime, courts frequently have imposed upon counsel a higher standard of effective representation.[33]

Thirdly, some Indiana cases have required a more extreme showing of incompetency when counsel is privately retained rather than court-appointed. It is argued that since the defendant had an opportunity to select whomever he wanted as counsel and since he could discharge such counsel for ineffectiveness at any time during the judicial proceedings, he cannot in retrospect challenge the competency of such representation.[34] This distinction is contrary, however, to a long line of cases holding that the Indiana and federal constitutions require competent counsel in all criminal cases, regardless of the method of counsel's selection.[35]

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culty of the case, counsel asserted the defense of temporary insanity and sudden heat of passion, but the jury was not persuaded. The court concluded that although other counsel might have employed a different strategy, the consequences were not likely to have been different. *See also* Achtien v. Dowd, 117 F.2d 989, 993 (7th Cir. 1941); Nicholas v. State, 300 N.E.2d 656, 663-64 (Ind. 1973); Ferguson v. State, 301 N.E.2d 382 (Ind. Ct. App. 1973).

[33]Powell v. Alabama, 287 U.S. 45 (1932) (three illiterate black youths were sentenced to death for the alleged rape of two white girls). Indiana courts have similarly reviewed these factors in holding counsel incompetent. Shack v. State, 249 Ind. 67, 231 N.E.2d 35 (1967) (poor, uneducated defendant sentenced to death for first degree murder); Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954) (poor, uneducated, young black sentenced to life imprisonment for rape); Sweet v. State, 233 Ind. 160, 117 N.E.2d 745 (1954) (poor youth sentenced to life imprisonment for kidnapping); Sanchez v. State, 199 Ind. 235, 157 N.E. 1 (1927) (eighteen year-old Mexican, with only limited knowledge of English, sentenced to death for first degree murder).

[34]United States v. Hack, 205 F.2d 723, 726-27 (7th Cir.), *cert. denied*, 346 U.S. 875 (1953); Gibson v. State, 251 Ind. 231, 236, 240 N.E.2d 812, 814 (1968); Johnson v. State, 251 Ind. 17, 23, 238 N.E.2d 651, 654-55 (1968); Rice v. State, 248 Ind. 200, 205, 223 N.E.2d 579, 582 (1967).

[35]Payne v. State, 301 N.E.2d 514, 516 (Ind. 1973); Lunce v. State, 233 Ind. 685, 692-93, 122 N.E.2d 5, 8 (1954) (dissenting opinion), *cert. denied*, 349 U.S. 960 (1955); Abraham v. State, 228 Ind. 179, 185, 91 N.E.2d 358, 360 (1950); Wilson v. State, 222 Ind. 63, 80, 51 N.E.2d 848, 855 (1943); Sanchez v. State, 199 Ind. 235, 246, 157 N.E. 1, 5 (1927). Note the willingness of federal courts to entertain such actions when state remedies have failed. Lunce v. Overlade, 244 F.2d 108, 110-11 (7th Cir. 1957); Achtien v. Dowd, 117 F.2d 989, 993 (7th Cir. 1941). The court's argument in Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969), merits consideration:

At least three rationales underlie the strictness of the Indiana standard for incompetency of counsel. First, appellate judges do not want to "second guess" the trial attorney's honest errors in judgment or mistakes in trial tactics.[36] Counsel's extensive personal contact with the defendant, the witnesses, and the facts of the case, it is argued, place him in a superior position to select the most effective defense strategy. Second, Indiana courts are concerned that convicted criminal defendants, in the leisure of retrospection, will overburden the courts with claims of incompetency of their trial lawyers.[37] Thus, courts frequently emphasize that "hindsight

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> The distinction between retained and appointed counsel overlooks the fact that, in either case, the state has obtained a conviction against the accused under such grossly unfair circumstances as to cast doubt upon the factual basis upon which proof of guilt rests. We agree with other courts which have held that in such circumstances sufficient state action exists to invoke the protections of the Fourteenth Amendment.

*Id.* at 1200.

[36]Blackburn v. State, 291 N.E.2d 686, 696 (Ind. 1973); Isaac v. State, 274 N.E.2d 231, 237 (Ind. 1971); Langley v. State, 250 Ind. 29, 36, 232 N.E.2d 611, 615, *cert. denied*, 393 U.S. 835 (1968); Brown v. State, 248 Ind. 11, 16, 221 N.E.2d 676, 680, *cert. denied*, 387 U.S. 925 (1966), *rehearing denied*, 389 U.S. 891 (1967); Haley v. State, 235 Ind. 333, 340, 133 N.E.2d 565, 568 (1956). Perhaps the most quoted passage in Indiana opinions on incompetency originated in Hendrickson v. State, 233 Ind. 341, 118 N.E.2d 493 (1954):

> Frequently, even the best of attorneys make decisions during the course of a trial which later may appear to have been errors in judgment. This is the natural result of the imperfections of man and are circumstances which cannot be avoided and must be expected. We cannot "second guess" a trial attorney and reverse a case simply because some other attorney might, under the attending circumstances, have pursued a different course.

*Id.* at 344, 118 N.E.2d at 495.

[37]Robbins v. State, 274 N.E.2d 255, 258 (Ind. 1971); Hoy v. State, 225 Ind. 428, 435, 75 N.E.2d 915, 920 (1947); Wilson v. State, 291 N.E.2d 570, 573 (Ind. Ct. App. 1973); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972). As the court in Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950), observed:

> If the uncorroborated statements of a man so vitally interested in the result must be accepted as true merely because such assertions have not been expressly denied, and when other facts and circumstances point in a different direction, it would obviously furnish a ready avenue of escape for any and all who have been convicted and imprisoned.

*Id.* at 465, 93 N.E.2d at 190.

is not the test" in evaluating counsel's effectiveness.[38] Finally, since most allegations of incompetency reach the court only after appellant has either failed to seek a timely appeal or after he has exhausted the normal routes of appeal, many courts view the defense as an attempt to circumvent normal procedure and unnecessarily prolong litigation through piecemeal, and often frivolous, attacks.[39] This, it is argued, imposes needless demands upon the time and resources of both the court and the public defender system.

An appellant may challenge the effectiveness of his attorney's representation in numerous areas, including conflict of interest, adequacy of preparation, pretrial advice and motions, trial acts and omissions, and adequacy of appellate counsel.

## II. Conflict of Interest

The constitutional right to effective counsel necessarily includes the corollary that counsel should exercise independent pro-

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[38]Robbins v. State, 274 N.E.2d 255, 258 (Ind. 1971); Thomas v. State, 251 Ind. 546, 554, 242 N.E.2d 919, 923-24 (1969); Shack v. State, 249 Ind. 67, 80, 231 N.E.2d 35, 44 (1967); Wilson v. State, 291 N.E.2d 570, 573 (Ind. Ct. App. 1973); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972).

[39]Probably the best statement of this position may be found in Callahan v. State, 247 Ind. 350, 214 N.E.2d 648 (1966):

> A case cannot be strung out indefinitely by bringing one issue after another before a court in piecemeal fashion at the option and with the delays which a defendant may see fit to use. . . . The petitioner has attempted to string out endless technical contentions regarding the trial and appeal. The ultimate purpose of a criminal trial is to determine the guilt or innocence of a defendant. It is not a game in which technical issues should be permitted to overshadow the real question of guilt. It is humanly impossible to hold a trial, no matter how many are granted, without some slight irregularity.

*Id.* at 356-57, 214 N.E.2d at 650. Similarly, in Canan v. State, 242 Ind. 576, 179 N.E.2d 746 (1962), the court quoted Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945):

> The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down.

242 Ind. at 581, 179 N.E.2d at 748. *See also* United States v. Hack, 205 F.2d 723, 727 (7th Cir.), *cert. denied*, 346 U.S. 875 (1953); Nicholas v. State, 300

fessional judgment by avoiding even the appearance of conflicting interests.[40] Competent counsel will not permit his personal interests, the interests of other clients, or the interests of third persons to compromise his loyalty to his client. A conflict of interest commonly arises when an attorney serves in two different employment capacities. Under the canons of professional ethics, it is entirely proper for an attorney who serves as a part-time assemblyman, city councilman, county commissioner, or in any similar legislative position, to represent a defendant charged with violation of a statute or ordinance when the defense is upon the merits.[41] However, it is unethical for a prosecuting attorney or any of his deputies, law partners, or associates to defend a person accused of a crime anywhere in Indiana or an adjoining state.[42] Moreover, when an attorney represents a person accused of a gruesome murder and simultaneously owns and publishes a local newspaper which gives extensive coverage to the alleged crime and subsequent trial, the lawyer's objectivity may be unduly impaired.[43]

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N.E.2d 656, 663 (Ind. 1973); Haddock v. State, 298 N.E.2d 418, 420 (Ind. 1973); Hendrickson v. State, 233 Ind. 341, 344, 118 N.E.2d 493, 495 (1954).

[40]As the Supreme Court emphasized in Glasser v. United States, 325 U.S. 60 (1942): "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." *Id.* at 70. *See also* Von Moltke v. Gillies, 332 U.S. 708, 726 (1948); CODE OF PROFESSIONAL RESPONSIBILITY, Canons 5, 9.

[41]IND. STATE BAR ASS'N LEGAL ETHICS COMM., OPINIONS, No. 10 (1965). *See also* CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 5-105.

[42]IND. STATE BAR ASS'N LEGAL ETHICS COMM., OPINIONS, No. 2 (1972); No. 12 (1963). This is true even if the attorney never participates in any prosecutions. *See id.* No. 2 (1964).

[43]Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969). On remand, the district court found no conflict of interest sufficiently prejudicial to justify reversal. The court of appeals in Wilson v. Lash, 457 F.2d 106 (7th Cir.), *cert. denied*, 409 U.S. 881 (1972), only reluctantly affirmed saying:

> Normally an attorney—assuming a similar dual role in a gruesome murder trial likely to create a hostile environment within a small community—would need heroic virtue to adhere steadfastly to the requisite neutral line between such conflicting interests. . . . [Attorney] Bang's role nonetheless was grossly inappropriate, even if not prejudicial, and we condemn the acceptance of the dual role as inimical to the interest of a sound and trustworthy administration of justice.

*Id.* at 109.

An attorney's personal interests may also adversely influence the independence of his judgment. Thus, in *Pelley v. United States,*[44] appellant alleged that the prosecution intimidated one of his two attorneys into withholding an effective defense by threatening to deport counsel's wife, a German alien. But the court concluded that the attorney's possible conflict of interest did not constitute ineffective representation, since competent co-counsel was capable of adequately presenting appellant's case.[45] Similarly, a defense attorney's business connections with a bank allegedly robbed by defendant may constitute a conflict of interest when such attorney fails to fully disclose this relationship to his client.[46]

A defense attorney's effectiveness may also be impaired when he represents two or more clients who may have inconsistent or diverse interests. Because public defenders frequently handle large case loads, a few appellants have argued that such overloads presented a conflict of interest which rendered it physically impossible for counsel to devote sufficient time to adequate trial preparation.[47] But absent a specific showing that pauper counsel's other cases conflicted with defendant's trial, a lawyer is not incompetent on the theory that he has engaged in too many criminal cases as a pauper attorey.[48] The additional burden imposed upon an attorney representing codefendants in a criminal action may substantially

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[44]214 F.2d 597 (7th Cir. 1954), *cert. denied,* 348 U.S. 915 (1955).

[45]*Id.* at 601-02. However, the dissent persuasively argued that:

> . . . the presence in the case of an able, conscientious and honest associate counsel might not necessarily offset the damaging effects resulting from the consequent dereliction of the chief counsel. If one hires a team of horses to pull a loaded wagon, he is not getting proper service if only one of the horses is performing its proper function while the other is pulling back.

*Id.* at 603 (Schnackenberg, J., dissenting).

[46]Zurita v. United States, 410 F.2d 477, 480 (7th Cir. 1969). The court remanded for a hearing to determine if counsel represented the bank during the defendant's trial. If such a conflict existed, said the court of appeals, the situation was so "fraught with the dangers of prejudice" that a new trial would be required. *Id.*

[47]Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969); Brown v. State, 248 Ind. 11, 221 N.E.2d 676, *cert. denied,* 387 U.S. 925 (1966), *rehearing denied,* 389 U.S. 891 (1967).

[48]Brown v. State, 248 Ind. 11, 17, 221 N.E.2d 676, 680 (1966). In Thomas v. State, 251 Ind. 546, 557, 242 N.E.2d 919, 925 (1969), the court observed that since the public defender was confronted with twice his normal case load, he may have done all he could within the time restrictions. However, when

impair the counsel's effectiveness.[49] However, courts have been reluctant to reverse convictions on such grounds. In *Wilson v. State*,[50] counsel defended both father and son against charges of first degree burglary. Relying upon explicit instructions from the codefendants, their attorney successfully negotiated with the state to obtain charges carrying lesser penalties. On appeal, the father alleged that his guilty plea was sacrificial in nature to insure that his son received a lesser sentence. But the court held that representation of codefendants for the purpose of negotiating a plea was not per se a conflict of interest.[51]

Potentially improper relationships with others in the judicial process may also evoke charges of conflicting interests. But the mere sharing of office space by retained counsel with a law firm which serves as counsel for the sheriff does not necessarily constitute a conflict of interest.[52] Moreover, a lawyer may ethically serve as a court-appointed attorney in circuit court even though the lawyer is the father and law partner of a city court judge within the same circuit.[53] Clearly, a lawyer should not accept employment as an advocate in any matter in which he has previously acted in a judicial capacity. Thus, a conflict of interest arises when a judge pro tempore sets defendant's arraignment, continues the proceedings, sets the cause for trial, and later serves as defendant's court-appointed trial counsel.[54] In short, any criminal appellant in Indiana who seeks to reverse his conviction based upon his counsel's conflicting interests must normally demonstrate not only

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such a public defender becomes overloaded, the court has the affirmative duty to appoint other counsel to assist him in providing adequate legal representation.

[49]Glasser v. United States, 315 U.S. 60, 75 (1942).

[50]291 N.E.2d 570 (Ind. Ct. App. 1973).

[51]*Id.* at 573. *See also* Jennings v. State, 297 N.E.2d 909, 914 (Ind. Ct. App. 1973).

[52]Callahan v. State, 247 Ind. 350, 214 N.E.2d 648 (1966). The court even suggested that such an affiliation may have motivated defendant to choose such counsel on grounds that his attorney might obtain more information and accommodation through such a relationship.

[53]IND. STATE BAR ASS'N LEGAL ETHICS COMM., OPINIONS, No. 8 (1964).

[54]Tokash v. State, 232 Ind. 668, 115 N.E.2d 745 (1953).

that such compromising influences existed, but also that they actually prejudiced his defense.

## III. Adequacy of Preparation

The adequacy of defense counsel's preparation also constitutes an essential element of the right to effective counsel.[55] While our judicial system should strive toward the efficient disposition of criminal cases, this desirable goal cannot be achieved at the expense of depriving a defendant of his fundamental rights. Thus, Indiana courts have frequently held that mere "perfunctory representation" is not constitutionally sufficient.[56] However, the adequacy of an attorney's preparation must be determined by the facts of each case.[57] The total number of attorney-client consultations, the length and content of such consultations, and the extent of counsel's outside preparation and investigation of the case are all factors to be considered by the reviewing court.

Indiana courts have refused to fix a minimum amount of time necessary for adequate client consultation and case preparation.[58] Preparation periods of four days,[59] sixty-five hours,[60] two and

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[55]Powell v. Alabama, 287 U.S. 45, 71-72 (1932); Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969); Sweet v. State, 233 Ind. 160, 112 N.E.2d 745 (1954); Bradley v. State, 227 Ind. 131, 84 N.E.2d 580 (1949); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920); Hartman v. State, 292 N.E.2d 293 (Ind. Ct. App. 1973).

[56]Shack v. State, 249 Ind. 67, 79, 231 N.E.2d 35, 43 (1967); Lloyd v. State, 241 Ind. 192, 196, 170 N.E.2d 904, 906 (1960); Abraham v. State, 228 Ind. 179, 185, 91 N.E.2d 358, 360 (1950); Wilson v. State, 222 Ind. 63, 80, 51 N.E.2d 848, 855 (1943); Castro v. State, 196 Ind. 385, 391, 147 N.E. 321, 323 (1925).

[57]State v. Irvin, 291 N.E.2d 70, 73 (Ind. 1973); Thomas v. State, 251 Ind. 546, 550, 242 N.E.2d 919, 921 (1969); Shack v. State, 249 Ind. 67, 78-79, 231 N.E.2d 35, 43 (1967); Hoy v. State, 225 Ind. 428, 433, 75 N.E.2d 915, 918 (1947); Lenwell v. State, 294 N.E.2d 643, 645 (Ind. Ct. App. 1973).

[58]Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969); Lloyd v. State, 241 Ind. 192, 170 N.E.2d 904 (1960); Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947); Hartman v. State, 292 N.E.2d 293 (Ind. Ct. App. 1973).

[59]Sweet v. State, 233 Ind. 160, 117 N.E.2d 745 (1954). The judge did not appoint counsel until seven days after defendant's request and only four days before trial.

[60]Bradley v. State, 227 Ind. 131, 84 N.E.2d 580 (1949).

one-half hours,[61] one hour,[62] and twenty minutes[63] have been held insufficient under the facts of a particular case. In *Shack v. State*,[64] the Indiana Supreme Court held that an attorney did not adequately prepare in a first degree murder case when he expended only eighteen hours in factual investigation, legal research, and client consultation. The court, after noting the inexperience of trial counsel, emphasized that even a "seasoned trial lawyer would deem it unthinkable to go to trial with only eighteen (18) hours of preparation."[65] An experienced, mature practitioner, it added, would spend "several times eighteen hours in legal research alone" in order to properly prepare just the instructions concerning the various elements of murder.[66]

On the other hand, surprisingly brief periods of time, including eleven hours,[67] two hours,[68] one hour,[69] thirty minutes,[70] fifteen minutes,[71] and ten minutes[72] have been found sufficient for an

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[61]Thomas v. State, 251 Ind. 546, 242 N.E.2d 919 (1969); Lloyd v. State, 241 Ind. 192, 170 N.E.2d 904 (1960).

[62]Hoy v. State, 225 Ind. 179, 91 N.E.2d 358 (1950); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927).

[63]Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927).

[64]249 Ind. 67, 231 N.E.2d 35 (1967).

[65]*Id.* at 79-80, 231 N.E.2d at 42.

[66]*Id.* at 80, 231 N.E.2d at 42.

[67]State v. Irvin, 291 N.E.2d 70 (Ind. 1973).

[68]Lenwell v. State, 294 N.E.2d 643 (Ind. Ct. App. 1973); Wilson v. State, 291 N.E.2d 570 (Ind. Ct. App. 1973).

[69]Canan v. State, 242 Ind. 576, 179 N.E.2d 746 (1962). The defendant alleged only ten minutes of consultation, while the attorney alleged sixty minutes consultation plus additional time spent in outside preparation. *See also* Sargeant v. State, 299 N.E.2d 219, 221 (Ind. Ct. App. 1973), in which the trial attorney conferred with defendant on the day of trial "probably less than an hour or an hour and a half."

[70]Johns v. State, 227 Ind. 737, 89 N.E.2d 281 (1949). However, the result was overturned by the federal court in Johns v. Overlade, 122 F. Supp. 921 (N.D. Ind. 1953).

[71]Finger v. State, 293 N.E.2d 25 (Ind. 1973); Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950). In Haddock v. State, 298 N.E.2d 418, 420 (Ind. 1973), the attorney testified that appellant's allegation that he conferred with him only fifteen minutes before trial was "mistaken."

[72]Mitz v. State, 233 Ind. 537, 121 N.E.2d 874 (1954).

attorney to adequately advise defendant and prepare his case. It should be noted, however, that many of these cases contain strong and eloquent dissents which raise substantial doubts as to the ability of any lawyer to adequately prepare a case in such a brief time span.[73]

An attorney must make an adequate independent investigation of the facts of the case by thoroughly interviewing the defendant and double-checking his story.[74] Effective preparation also includes researching the relevant statutory and case law, interviewing all available prosecution and defense witnesses, procuring compulsory process for defense witnesses to be called, and possibly visiting the scene of the crime.[75] When a knowledgeable defendant intends to plead guilty to the offense, neither a lengthy consultation nor an extensive investigation by his lawyer is necessary since no purpose would be served in spending countless hours gathering

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[73]For example, in Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950), Chief Justice Emmert wrote:

> No one contends that an accused is entitled to the services of a Darrow or a Choate. Our profession has never made any claim of infallibility in either criminal or civil litigation. But we know from the many laborious hours that were spent by prior members of this court in writing the many cases on unlawful search and seizure, that such problems could not be adequately considered by any lawyer in fifteen minutes.

*Id.* at 477, 93 N.E.2d at 195. Similarly, Judge Gilkison dissented in Mitz v. State, 233 Ind. 537, 121 N.E.2d 874 (1954):

> I do not think the lawyer has ever lived who could discharge his duties to a client so charged, by consulting with him for only ten minutes. The ten minute consultation with their client by the pauper attorneys conclusively shows that they were rendering merely perfunctory service, attempting to supply the requirements of due process but doing nothing for their client whatever. This is the shortest consultation to be found in the books.

*Id.* at 544, 121 N.E.2d at 877.

[74]Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954); Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950); Johns v. State, 227 Ind. 737, 89 N.E.2d 281 (1949) (dissenting opinion); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920).

[75]Shack v. State, 249 Ind. 67, 231 N.E.2d 35 (1967); Johns v. State, 227 Ind. 737, 89 N.E.2d 281 (1949) (dissenting opinion); Hoy v. State, 225 Ind. 428, 75 N.E.2d 915 (1947); Hartman v. State, 292 N.E.2d 293 (Ind. Ct. App. 1973).

evidence for a trial which is destined never to occur.[76] Thus, in *Wilson v. State,*[77] the court held that counsel's failure to investigate the facts or to interview witnesses did not establish incompetence when he was requested by defendant to plea bargain his case.[78] Similarly, extensive preparation was held unnecessary in *Mitz v. State,*[79] in which defendant had admitted his guilt to both the police and his attorney and had asked the latter to work out the "best deal" possible.[80]

On the other hand, when a trial is actually held, a court will require more extensive preparation by defense counsel. Clearly, when on the day of trial the court appoints an attorney who is unfamiliar with the case and who is permitted only a brief time for client consultation, the defendant's lawyer has been denied a sufficient time to prepare adequately for trial.[81] In *Hartman v. State,*[82] the court of appeals held that defendant's right to adequate preparation time was violated when the trial judge appointed an attorney who "happened to be in the courtroom" and allowed him only a few minutes to discuss the case with his client.[83] However, when a defendant has had ample opportunity before trial to confer with counsel, his failure to take full advantage of such time does not constitute inadequate preparation.[84]

When an attorney fails to interview readily avaliable alibi witnesses and key prosecution witnesses[85] or when he makes no

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[76]Lenwell v. State, 294 N.E.2d 643, 645 (Ind. Ct. App. 1973).

[77]291 N.E.2d 570 (Ind. Ct. App. 1973).

[78]*Id.* at 575. *See also* Ferguson v. State, 301 N.E.2d 382, 386 (Ind. Ct. App. 1973), in which the court held that appointed counsel's independent investigation and three discussions with his client prior to his guilty plea "were entirely consistent with sound defense strategy."

[79]233 Ind. 537, 121 N.E.2d 874 (1954).

[80]*Id.* at 539, 121 N.E.2d at 875.

[81]Lloyd v. State, 241 Ind. 192, 170 N.E.2d 904 (1960) (two and one-half hours); Hoy v. State, 225 Ind. 428, 75 N.E.2d 915 (1947) (one hour). *See also* Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943).

[82]292 N.E.2d 293 (Ind. Ct. App. 1973).

[83]*Id.*

[84]Boatman v. State, 235 Ind. 623, 137 N.E.2d 28 (1956). Two months elapsed between the time defendant obtained counsel and trial.

[85]Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954). *See also* Shack v. State, 249 Ind. 67, 231 N.E.2d 35 (1967).

effort to obtain the defendant's explanation of the facts surrounding a homicide, his preparation is clearly inadequate.[86] In *Abraham v. State,*[87] the court held that counsel had not made a sufficient investigation of the facts when he failed to determine how a suspect's confession had been obtained, to seek defendant's version of the alleged offense, to obtain defense witnesses, or to ascertain the testimony of prosecution witnesses.[88] In *Thomas v. State,*[89] the court found counsel negligent in his preparation when he delayed contacting key defense witnesses until the night before the trial.[90] However, in *Irvin v. State,*[91] the court refused to find inadequacy of investigation when defendant failed to name specific witnesses or explain how they would have been helpful to the defense.[92]

Consistent with adequate preparation, the right to effective assistance of counsel clearly includes the right of unfettered communication between attorney and client.[93] Thus, in *Johns v. Overlade,*[94] the court held counsel's representation ineffective when defendant pleaded guilty immediately after a brief attorney-client conference in an adjoining courtroom not more than twenty feet from police officers.[95] In *Parker v. United States,*[96] defendant alleged that the presence of a listening device in the room used for attorney-client conferences prevented private communications. The court rejected the argument on grounds that the defense had made no effort to ascertain whether the device was ever used or was

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[86]Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927).

[87]228 Ind. 179, 91 N.E.2d 358 (1950).

[88]*Id.* at 184, 91 N.E.2d at 360.

[89]251 Ind. 546, 242 N.E.2d 919 (1969).

[90]*Id.* at 554, 242 N.E.2d at 924.

[91]291 N.E.2d 70 (Ind. 1973).

[92]*Id.* at 73.

[93]Parker v. United States, 358 F.2d 50 (7th Cir. 1965), *cert. denied,* 386 U.S. 916 (1967).

[94]122 F. Supp. 921 (N.D. Ind. 1953).

[95]*Id.* at 922.

[96]358 F.2d 50 (7th Cir. 1965).

even capable of recording conversation.[97] In summary, Indiana courts have tended to find inadequacy of preparation only when the facts clearly indicated that either the attorney was performing only in a perfunctory manner or when state action had jeopardized the privacy of attorney-client communications.

## IV. Pretrial Advice and Motions

A defense attorney bears an affirmative obligation to adequately advise his client regarding the nature of the criminal charges against him, the possible penalty, the existence of defenses, and the consequences of an insanity or guilty plea. Counsel should also inform his client of his constitutional rights to counsel, trial by jury, compulsory process, confrontation of witnesses, and the privilege against self-incrimination.[98] Indiana courts presume that an attorney has properly informed defendant of his rights and an appellant must present strong and convincing proof to overcome this presumption.[99] Thus, the absence of a clear and unequivocal advice of rights in the record does not necessarily prove that defendant was not fully advised.[100] Moreover, the trial court's acceptance of the attorney's testimony that he fully advised defendant of his rights will normally be upheld.[101] Finally, even though an attorney failed to advise his client, defendant's acknowledgment to the court that he heard and understood his rights may suffice.[102]

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[97] *Id.* at 53.

[98] Conley v. State, 284 N.E.2d 803 (Ind. 1972); Penn v. State, 242 Ind. 359, 177 N.E.2d 889 (1961); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920).

[99] Canan v. State, 242 Ind. 576, 179 N.E. 746 (1962); Penn v. State, 242 Ind. 359, 177 N.E.2d 889 (1961); Dowling v. State, 233 Ind. 426, 118 N.E.2d 801 (1954).

[100] Penn v. State, 242 Ind. 359, 177 N.E.2d 889 (1961).

[101] *See, e.g.*, Smith v. State, 243 Ind. 432, 186 N.E.2d 571 (1962); Canan v. State, 242 Ind. 576, 179 N.E.2d 746 (1962). In Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950), the Indiana Supreme Court held, in a three-to-two opinion, that appellant's failure to produce his attorney's affidavit or testimony raised a presumption that this evidence, if produced, would have been unfavorable to him. However, the forceful dissenting opinions by Chief Justice Emmert and Judge Gilkison suggested that the court should not disregard uncontradicted testimony of appellant counsel's failure to advise him of his rights. *Id.* at 472, 481, 93 N.E.2d at 192, 197.

[102] Penn v. State, 242 Ind. 359, 177 N.E.2d 889 (1961).

Nevertheless, many an appellant has argued that since his attorney failed to properly advise him of his rights, he was incapable of knowingly, freely, and understandingly entering a guilty plea.[103] Indiana courts have held that counsel has no duty to oppose defendant's voluntary desire to plead guilty unless he is aware of his client's innocence.[104] However, when the court finds substantial evidence that the attorney never conferred with his client at all[105] or failed to sufficiently investigate the facts to understandingly advise him regarding a guilty plea,[106] defendant has been denied effective assistance of counsel. In *Rhodes v. State*,[107] court-appointed counsel conferred with defendant no more than twenty minutes, failed to advise him that intent to kill and premeditation were necessary elements of first degree murder, and made no effort to obtain defendant's side of the story. Further inquiry by the attorney would have revealed that the shooting was probably accidental and that defendant, who was totally ignorant of the law constituting homicide, may have pleaded guilty under fear of mob violence. The court permitted appellant to withdraw his guilty plea and enter one of not guilty.[108]

Appellant may allege that his counsel did not advise him of his right to a jury trial. Whether in fact the attorney advised defendant of this right is an issue of fact for the trial court to determine.[109] However, when a defendant proceeds without objection, the court will treat his failure to demand a jury trial as a waiver of this right.[110]

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[103]*See, e.g.*, Canan v. State, 242 Ind. 576, 179 N.E.2d 746 (1962); State v. Lindsey, 231 Ind. 126, 106 N.E.2d 230 (1952); Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927).

[104]Canan v. State, 242 Ind. 576, 179 N.E.2d 746 (1962).

[105]State v. Lindsey, 231 Ind. 126, 106 N.E.2d 230 (1952).

[106]Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950).

[107]199 Ind. 183, 156 N.E. 389 (1927).

[108]*Id.* at 195, 156 N.E. at 393-94.

[109]Lucas v. State, 227 Ind. 486, 490-91, 86 N.E.2d 682, 685 (1949); Fluty v. State, 224 Ind. 654, 660, 71 N.E.2d 565, 568 (1947).

[110]Lucas v. State, 227 Ind. 486, 488, 86 N.E.2d 682, 684-85 (1949). In Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947), the court noted: "It would be a mockery of justice to say that having voluntarily tried his case before the judge and losing, he [defendant] may then try it again by jury in hope

Incompetency allegations may focus upon other areas of counsel's pretrial representation. Appellant may argue that his attorney prejudicially filed an insanity plea without his permission, but most courts have deemed defendant bound by the particular strategy and tactics which his counsel believed appropriate. Thus, when defense counsel's filing of an insanity plea in *Brown v. State*[111] enabled the prosecution to admit into evidence defendant's prior sex offenses, the court refused to question counsel's belief that such evidence would bolster his client's insanity defense.[112] Similarly, in *Wilson v. Lash*,[113] the court concluded that the insanity plea may have helped support the defense of intoxication and may have placed an additional burden upon the State to prove defendant's capacity.[114] Appellant may alternately claim that his attorney failed to investigate the filing of an insanity plea. In *Shack v. State*,[115] the court declared that an experienced trial attorney would consider it malpractice not to seek a psychiatric examination of his client in order to determine whether to enter a plea of insanity.[116]

In establishing incompetency of counsel, appellant may also challenge his attorney's failure to quash a defective indictment. In so doing, appellant must not only show that the indictment was in fact defective,[117] but also that such an oversight was prejudicial to his case.[118] However, when an attorney's failure to

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of doing better." *Id.* at 660, 71 N.E.2d at 568. *See also* Hillman v. State, 234 Ind. 27, 123 N.E.2d 180 (1954).

[111]248 Ind. 11, 221 N.E.2d 676, *cert. denied*, 387 U.S. 925 (1966), *rehearing denied*, 389 U.S. 891 (1967).

[112]*Id.* at 16, 221 N.E.2d at 680. *See also* DeBruler v. State, 247 Ind. 1, 210 N.E.2d 666 (1965).

[113]457 F.2d 106 (7th Cir.), *cert. denied*, 409 U.S. 881 (1972).

[114]*Id.* at 109.

[115]249 Ind. 67, 231 N.E.2d 35 (1967).

[116]*Id.* at 80, 231 N.E.2d at 44.

[117]Lindsey v. State, 246 Ind. 432, 437, 204 N.E.2d 357, 361 (1965). In Fluty v. State, 224 Ind. 652, 660, 71 N.E.2d 565, 568 (1947), the court suggested that the merit of such a claim is basically within the discretion of counsel to determine, not the court.

[118]Robbins v. State, 274 N.E.2d 255 (Ind. 1971); Bays v. State, 240 Ind. 37, 48-49, 159 N.E.2d 393, 398 (1959), *cert. denied*, 361 U.S. 972 (1960); Boatman v. State, 235 Ind. 623, 626-27, 137 N.E.2d 28, 29-30 (1956). In

object indicates such ignorance of Indiana law and procedure that it was virtually impossible for him to protect defendant's rights, the court will find inadequacy of counsel.[119]

Allegations of incompetency of counsel may also arise in respect to an attorney's failure to obtain a change of judge or change of venue. Certainly, when counsel properly files for a change of venue, his failure to secure one is not evidence of incompetency.[120] However, even when an attorney fails to apply for a change of venue, appellant must show that he could not have obtained a fair and impartial trial because of prejudicial publicity or the particular bias of the judge.[121] Thus, failure to seek a change of venue does not constitute incompetency of counsel when the pretrial publicity may have benefited defendant's case. For example, in *Kidwell v. State*,[122] defense counsel actively sought a television interview during the trial to obtain maximum coverage for his side of the case. The court refused to "second guess" counsel's diligent pursuit of such a strategy.[123] When combined with other deficiencies, however, counsel's total failure to

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*Boatman*, the court stated that since appellant made no such showing, the court would not "attempt to second guess one's trial counsel as to what theoretical questions he should raise on behalf of an appellant." *Id.* at 627, 137 N.E.2d at 29-30. In *Robbins*, the indictment omitted to allege that defendant was over the age of sixteen, a necessary element of the crime. However, since defendant was at least nineteen at the time of the alleged crime, no prejudice resulted since the prosecution could have corrected the defect by filing a new indictment under IND. CODE § 35-1-23-29 (1971). *See also* Sawyer v. State, 298 N.E.2d 440, 444 (Ind. 1973), in which counsel's "technical oversight" in failing to quash a defective arrest warrant was held not to constitute ineffective representation.

[119]Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957). *See also* Lunce v. State, 233 Ind. 685, 122 N.E.2d 5, 7 (1954) (Emmert, J., dissenting), *cert. denied*, 349 U.S. 960 (1955).

[120]Hendrickson v. State, 233 Ind. 341, 118 N.E.2d 493 (1954). In Boatman v. State, 235 Ind. 623, 627, 137 N.E.2d 28, 30 (1956), the court emphasized that the granting or refusal of a change of venue is discretionary with the court.

[121]*See* Sweet v. Howard, 155 F.2d 715, 717 (7th Cir. 1946), *cert. denied*, 336 U.S. 950 (1949); Kidwell v. State, 295 N.E.2d 364 (Ind. 1973); State v. Irvin, 291 N.E.2d 70, 72 (Ind. 1973); Callahan v. State, 247 Ind. 350, 352, 214 N.E.2d 648, 650 (1966).

[122]295 N.E.2d 362 (Ind. 1973).

[123]*Id.* at 364-65.

protect his client from substantial community hostility created by prejudicial publicity may constitute ineffectiveness of counsel.[124]

In short, an appellant faces a difficult task in showing ineffectiveness of his counsel based upon his pretrial representation. To overcome the court's presumption of competency, appellant must demonstrate that counsel's failure to inform him of his rights or to file the proper pretrial motions substantially prejudiced his constitutional rights.

## V. Trial Acts and Omissions

In examining the totality of the facts, the reviewing court looks to the kind and quantity of affirmative actions which the trial counsel took on behalf of his client. If it appears from the record that the attorney frequently consulted with defendant, called witnesses, presented exhibits, objected to the admission of evidence, submitted instructions and the like, the court is more inclined to overlook certain of counsel's errors and omissions and find his representation competent.[125] For example, in *Hendrickson v. State*,[126] appellant alleged that his attorney failed to obtain a change of venue, secure a reduction of bail bond, object to the admission of certain evidence, and object to instructions given by the court. In finding counsel competent, the court noted that he had called nine witnesses, had filed a motion for change of judge and venue, had submitted a motion to quash the original affidavit, had objected to the introduction of numerous pieces of evidence including appellant's confession, had cross-examined prosecution witnesses, and had tendered five instructions.[127]

Appellants frequently allege that their attorney's failure to suppress or object to the admission of illegally seized or other-

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[124]Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969). On remand, however, the district court held that the publicity in this case was "factually oriented" and that petitioner offered no proof that the jury was in any way prejudiced by such coverage. *See* Wilson v. Lash, 457 F.2d 106, 108 (7th Cir.), *cert. denied*, 409 U.S. 881 (1972).

[125]Calhoun v. United States, 454 F.2d 702 (7th Cir. 1971), *cert. denied*, 405 U.S. 1019 (1972); Lowe v. State, 298 N.E.2d 421 (Ind. 1973); Blackburn v. State, 291 N.E.2d 686 (Ind. 1973); Schmittler v. State, 228 Ind. 450, 93 N.E.2d 184 (1950); Poindexter v. State, 290 N.E.2d 512 (Ind. Ct. App. 1972).

[126]233 Ind. 341, 118 N.E.2d 493 (1954).

[127]*Id.* at 343, 118 N.E.2d 494-95.

wise incompetent evidence rendered their representation ineffective. Many appellants are unsuccessful in such attempts because they fail to prove that the evidence was in fact inadmissible[128] or prejudicial to their cases.[129] Even when such evidence would normally be objectionable, courts are reluctant to question counsel's honest errors in judgment or trial tactics.[130] In *Blackburn v. State,*[131] appellant alleged that his counsel made no effort to suppress or object to certain unconstitutionally seized evidence including incriminating statements by appellant and an illegally seized letter to his wife. The court concluded that failure to object to the admission of this evidence was a matter of trial strategy since both the statement and the letter contained material which bolstered the defense position.[132] In *Haley v. State,*[133] counsel failed to object to prosecution questioning of the defendant concerning an illegally obtained confession. The court concluded, however, that defendant was not necessarily prejudiced by such inquiry since his replies may have impressed upon the jury the illegal force allegedly used upon him by the officers to obtain his confession.[134] Similarly, in *United States v. Hack,*[135] defendant's attorney failed to object to the admission of hearsay testimony of a prosecution witness. The court held that it may have been good trial strategy to permit the witness to personally narrate his version of the case and later impeach him through cross-

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[128]Robbins v. State, 274 N.E.2d 255 (Ind. 1971); Brown v. State, 248 Ind. 11, 221 N.E.2d 676, *cert. denied,* 387 U.S. 925 (1966), *rehearing denied,* 389 U.S. 891 (1967); Lindsey v. State, 246 Ind. 431, 204 N.E.2d 357 (1965); Bays v. State, 240 Ind. 37, 157 N.E.2d 393 (1959), *cert. denied,* 361 U.S. 972 (1960). The court in Isaac v. State, 274 N.E.2d 231 (Ind. 1971), expressed the most common rationale: "Certainly an attorney cannot be considered incompetent for failing to do a futile thing." *Id.* at 237.

[129]Blackburn v. State, 291 N.E.2d 686 (Ind. 1973); Castro v. State, 196 Ind. 385, 147 N.E. 321 (1925).

[130]Robbins v. State, 274 N.E.2d 255 (Ind. 1971); Wagner v. State, 243 Ind. 570, 188 N.E.2d 914 (1963); Groover v. State, 239 Ind. 271, 156 N.E.2d 307 (1959); Haley v. State, 235 Ind. 333, 133 N.E.2d 565 (1956); Hendrickson v. State, 233 Ind. 341, 118 N.E.2d 493 (1954).

[131]291 N.E.2d 686 (Ind. 1973).

[132]*Id.* at 696-97.

[133]235 Ind. 333, 133 N.E.2d 565 (1956).

[134]*Id.* at 339-40, 133 N.E.2d at 567.

[135]205 F.2d 723 (7th Cir.), *cert. denied,* 346 U.S. 875 (1953).

examination and contradictory testimony by defendant.[136] However, when defendant's substantial constitutional rights are flagrantly violated through the improper admission of damaging evidence, the court may conclude that counsel's failure to object constituted a denial of effective counsel.[137] For example, in finding counsel incompetent in *Wilson v. State*,[138] the court noted that he had not objected at trial to the admission of allegedly stolen goods seized from the defendant's home by police during a warrantless search.[139]

Appellant may support his charge of incompetency of counsel by alleging that his attorney failed to call certain witnesses, to permit defendant to testify, or to offer particular evidence at trial for the defense. Many appellants, however, do not provide sufficient proof that such witnesses were available and willing to testify[140] or that such testimony would have actually benefited their case.[141] For example, in *Willoughby v. State*,[142] neither defendant nor any persons living in the vicinity of the fatal shooting were able to give the public defender the names or identifications of the alleged witnesses.[143] In *Wilson v. Lash*,[144] appellant claimed his attorney failed to call an alibi witness or pursue exculpatory leads. On remand, the district court found that defendant's lawyer had pursued all leads given to him, that the alleged alibi witness not called at trial refused to even sign an

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[136]*Id.* at 726.

[137]Lunce v. Overlade, 244 F.2d 108, 110 (7th Cir. 1957); Lunce v. State, 233 Ind. 685, 122 N.E.2d 5 (1954) (dissenting opinion), *cert. denied*, 349 U.S. 960 (1955); Sanchez v. State, 199 Ind. 235, 157 N.E. 1 (1927).

[138]222 Ind. 63, 51 N.E.2d 848 (1943).

[139]*Id.* at 77, 51 N.E.2d at 854-55.

[140]Sweet v. Howard, 155 F.2d 715, 718 (7th Cir. 1946), *cert. denied*, 336 U.S. 950 (1949); Lindsey v. State, 246 Ind. 431, 441, 204 N.E.2d 357, 363 (1965).

[141]Sweet v. Howard, 155 F.2d 715, 718 (7th Cir. 1946); Johnson v. State, 278 N.E.2d 577, 655 (Ind. 1972); Shumak v. State, 254 Ind. 117, 120, 258 N.E.2d 158, 159-60 (1970); Callahan v. State, 247 Ind. 350, 355, 214 N.E.2d 648, 651 (1966); Johnson v. State, 300 N.E.2d 369, 371 (Ind. Ct. App. 1973).

[142]242 Ind. 183, 167 N.E.2d 881, *rehearing denied*, 242 Ind. 183, 177 N.E.2d 465 (1961), *cert denied*, 374 U.S. 832 (1963).

[143]*Id.* at 187-88, 177 N.E.2d at 467.

[144]457 F.2d 106 (7th Cir.), *cert. denied*, 409 U.S. 881 (1972).

affidavit on behalf of defendant, and that defendant's testimony of proffered help from friends in Germany was "nebulous."[145] Counsel's failure to file a timely notice of an alibi to the prosecution often precludes defendant from offering the testimony of an alibi witness at trial.[146] But Indiana courts have consistently held that failure to file such notice does not render counsel incompetent.[147]

Moreover, most Indiana courts have refused to question counsel's decisions concerning the presentation of evidence because such judgments fall into the category of strategy and tactics.[148] Thus, in *Lindsey v. State*,[149] the court upheld counsel's failure to introduce character witnesses on grounds that their testimony would allow the prosecution to introduce evidence of defendant's prior misconduct, convictions, or bad moral character.[150] In *Jen-*

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[145]*Id* at 109-110. In Calhoun v. United States, 454 F.2d 702 (7th Cir. 1971), *cert. denied*, 405 U.S. 1019 (1972), appellant argued that his trial attorney presented no expert medical witnesses to testify regarding his alleged incompetency to plead guilty. The court noted that defense counsel had introduced a "great deal of evidence" from a number of witnesses and that there was no indication more persuasive testimony was available. *Id.* at 703.

It is clear that adequacy of representation cannot be based upon the mere number of witnesses called. Stice v. State, 228 Ind. 144, 151, 89 N.E.2d 915, 918 (1950).

[146]IND. CODE § 35-5-1-1 (1971) requires that notice of alibi be filed at least ten days prior to trial.

[147]Isaac v. State, 274 N.E.2d 231 (Ind. 1971); Callahan v. State, 247 Ind. 350, 214 N.E.2d 648 (1966); Wagner v. State, 243 Ind. 570, 188 N.E.2d 914 (1963); Jennings v. State, 297 N.E.2d 909 (Ind. Ct. App. 1973).

[148]Casey v. Overlade, 129 F. Supp. 433 (N.D. Ind. 1955); Johnson v. State, 251 Ind. 17, 238 N.E.2d 651 (1968); Wagner v. State, 243 Ind. 570, 188 N.E.2d 914 (1963); Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947); Johnson v. State, 300 N.E.2d 369, 371 (Ind. Ct. App. 1973).

[149]246 Ind. 431, 204 N.E.2d 357 (1965).

[150]*Id.* at 441, 204 N.E.2d at 363. In Sims v. State, 246 Ind. 660, 208 N.E.2d 469 (1965), *cert. denied*, 384 U.S. 922 (1966), defendant's attorneys threatened to withdraw from the case if defendant testified. The court held such conduct was justified in view of defendant's contemptuous attitude toward the court and his general lack of credibility. "Counsel had a duty to control the conduct of the case and to protect the interests of their client to the best of their ability, or to withdraw from the case." *Id.* at 667, 208 N.E.2d at 472. *See also* United States v. Hartenfeld, 113 F.2d 359, 362 (7th Cir. 1940).

*nings v. State,*[151] appellant contended that he had supplied his attorney with a list of alibi witnesses, but that only one of the witnesses was called to testify. In refusing to speculate on counsel's rationale, the court held that attorneys must be given "ample latitude" for variations in strategy and tactics.[152] Similarly, in *Poindexter v. State,*[153] counsel advised defendant to testify in his own behalf, thus permitting the prosecution to cross-examine defendant about his prior convictions, but the court held counsel's advice constituted trial strategy, not grounds for incompetency.[154]

Clearly, when counsel presents no evidence at all, his representation is inadequate. In *Thomas v. State,*[155] the public defender presented no evidence to rebut the uncorroborated testimony of the state's chief witness in spite of the fact that defendant had requested his counsel to subpoena two named witnesses to support his side of the story.[156] In *Hillman v. State,*[157] counsel presented no argument whatsoever in defense of his client. He made no opening or closing statement. He failed to question, have subpoenaed, or offer at trial three alibi witnesses, even though defendant gave him their names and the locality of their residences. Additionally, the court noted that counsel did not advise defendant to testify on his own behalf regarding an allegedly illegal confession.[158] Counsel was held incompetent in both cases.

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[151]297 N.E.2d 909 (Ind. Ct. App. 1973).

[152]*Id.* at 912.

[153]290 N.E.2d 512 (Ind. Ct. App. 1972).

[154]*Id.* at 513.

[155]251 Ind. 546, 242 N.E.2d 919 (1969).

[156]*Id.* at 555, 242 N.E.2d at 923.

[157]234 Ind. 27, 123 N.E.2d 180 (1954).

[158]The court concluded that counsel never uttered "one word from the beginning to and including the close of the trial proceedings." *Id.* at 31-32, 123 N.E.2d at 180-81. *But see* Nicholas v. State, 300 N.E.2d 656 (Ind. 1973), in which defense counsel waived opening and closing arguments, refused to cross-examine, and introduced no evidence. In holding counsel competent, the court concluded that the attorney's failure to present evidence was outweighed by the following exceptional circumstances: (1) the state's witnesses were unimpeachable and appellant had no credible evidence to be presented, (2) appellant did not tell the truth concerning a number of areas of his counsel's representation, (3) appellant requested the same defense counsel to represent him on two occasions subsequent to the trial in question,

Even when counsel presents some evidence, his failure to interview, subpoena, or call certain witnesses listed by defendant may result in a finding of incompetency. Thus, in *Shack v. State,*[159] defendant furnished his attorney with names of witnesses to testify, but counsel admitted that he did not subpoena them for trial on grounds that he was unable to locate them or he believed that they would not benefit defendant's case.[160] In *Wilson v. State,*[161] counsel neglected to call defendant's "best witness." Counsel did call a bookkeeper, but her testimony was "worthless" because counsel acquiesced in her failure to produce the necessary records upon which her testimony was predicated.[162] Again, the court held counsel's representation inadequate in both cases.

In conjunction with other shortcomings, appellants frequently allege in their incompetency charges that their trial counsel failed to file a motion for a new trial after their convictions.[163] A trial attorney has a duty to keep adequate notes during the trial and from such notes to prepare a proper and timely motion for a new trial.[164] However, his duty to actually file the motion arises only when

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and (4) since the district court had already determined the issue of effectiveness of counsel, it was res judicata. However, note the dissenting opinion of Justice DeBruler concluding that this case involved the kind of representation which Indiana courts have condemned as perfunctory. *Id.* at 664-65.

[159]249 Ind. 67, 231 N.E.2d 35 (1967).

[160]*Id.* at 76, 231 N.E.2d at 42.

[161]222 Ind. 63, 51 N.E.2d 848 (1943).

[162]*Id.* at 75-76, 81, 51 N.E.2d at 851-52, 855. In Blincoe v. State, 243 Ind. 387, 185 N.E.2d 729 (1962), defendant submitted a list of alibi witnesses to his attorney, but he neither subpoened them nor filed the necessary notice of intention to prove an alibi. In Sanchez v. State, 199 Ind. 235, 244, 157 N.E. 1, 4-5 (1927), counsel did not subpoena any witnesses to testify as to defendant's good character for peacefulness in a first degree murder trial. Counsel was found incompetent in both cases.

[163]Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969); Rice v. State, 248 Ind. 200, 223 N.E.2d 579 (1967); *In re* Sobieski, 246 Ind. 222, 204 N.E.2d 353 (1965); Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956); Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947). It should be noted that the motion for a new trial is now included under Indiana Rule of Trial Procedure 59 as the motion to correct errors.

[164]Turner v. State, 249 Ind. 533, 233 N.E.2d 473 (1968); Macon v. State, 248 Ind. 81, 221 N.E.2d 428 (1966), *cert. denied,* 386 U.S. 1038 (1967); Bullard v. State, 245 Ind. 190, 197 N.E.2d 295 (1964); Sparks v. State, 245 Ind. 245, 196 N.E.2d 748 (1964); State *ex rel.* Macon v. Orange Cir. Ct.,

there are meritorious grounds for a new trial.[165] Thus, the failure of counsel to file a motion for new trial raises a presumption that no meritorious grounds existed for such a motion.[166] Indeed, some courts have suggested that a trial lawyer might subject himself to disciplinary action if he knowingly filed such a motion upon frivolous and nonmeritorious grounds.[167] However, a recent holding by the Indiana Court of Appeals requiring public defenders to pursue even frivolous appeals casts significant doubt upon this prior Indiana case law.[168]

The fact that an attorney had committed certain alleged errors at or before trial does not normally render his representation ineffective. The failure of a lawyer to challenge the absence of defense counsel at arraignment,[169] to move for a continuance,[170]

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243 Ind. 376, 185 N.E.2d 619 (1962). This responsibility is based upon two factors. First, since trial counsel is the person most familiar with any errors committed in the course of the trial, he is best prepared to present such errors for review. Second, the sixty day time limit for filing of the motion may not provide sufficient time for an attorney to procure a trial transcript and to inform himself adequately concerning the evidentiary record and the applicable law. *See* Willoughby v. State, 242 Ind. 183, 167 N.E.2d 881, *rehearing denied*, 177 N.E.2d 465 (1961), *cert. denied*, 374 U.S. 832 (1963). Some courts have held that court-appointed counsel should not be paid unless he files such a motion or a waiver thereof. *See, e.g.*, Lindsey v. State, 246 Ind. 431, 204 N.E.2d 357 (1965).

[165]Turner v. State, 249 Ind. 533, 233 N.E.2d 473 (1968); Rice v. State, 248 Ind. 200, 223 N.E.2d 579 (1967); *In re* Sobieski, 246 Ind. 222, 204 N.E.2d 353 (1965); Sparks v. State, 245 Ind. 245, 196 N.E.2d 748 (1964); State *ex rel.* Macon v. Orange Cir. Ct., 243 Ind. 376, 185 N.E.2d 619 (1962).

[166]Turner v. State, 249 Ind. 533, 233 N.E.2d 473 (1968); Macon v. State, 248 Ind. 81, 221 N.E.2d 428 (1966); Lindsey v. State, 246 Ind. 431, 204 N.E.2d 357 (1965); Bullard v. State, 245 Ind. 190, 197 N.E.2d 295 (1964); State *ex rel.* Macon v. Orange Cir. Ct., 245 Ind. 269, 195 N.E.2d 352 (1964), *cert. denied*, 380 U.S. 981 (1965). This presumption is overcome when the same attorney fails to file such motion and later inconsistently accepts the court's appointment as appellate counsel in the same case. *See* Sparks v. State, 245 Ind. 245, 196 N.E.2d 748 (1964).

[167]Macon v. State, 248 Ind. 81, 221 N.E.2d 428 (1966); *In re* Lee, 246 Ind. 7, 198 N.E.2d 231 (1964).

[168]*See* Dixon v. State, 284 N.E.2d 102 (Ind. Ct. App. 1972).

[169]Lindsey v. State, 246 Ind. 431, 437, 204 N.E.2d 357, 361-62 (1965).

[170]Sweet v. Howard, 155 F.2d 715, 717-18 (7th Cir. 1946), *cert. denied*, 336 U.S. 950 (1949); Sargeant v. State, 299 N.E.2d 219, 222 (Ind. Ct. App. 1973). *But see* Shack v. State, 249 Ind. 67, 76, 231 N.E.2d 35, 42, (1967), in

to question the constitutionality of a statute,[171] to request a jury trial,[172] to interrogate jurors during voir dire,[173] to cross-examine state witnesses,[174] to raise a particular defense,[175] or to tender an instruction[176] is not ipso facto evidence of counsel's inadequacy. Nor does counsel's failure to object to improper prosecution ques-

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which the court condemned counsel's failure to move for a continuance to allow additional preparation time when defendant was temporarily unable to speak due to a throat injury.

[171]Callahan v. State, 247 Ind. 350, 352-53, 214 N.E.2d 648, 650 (1966).

[172]Johnson v. State, 251 Ind. 17, 24, 238 N.E.2d 651, 655 (1968).

[173]Groover v. State, 239 Ind. 271, 280, 156 N.E.2d 307, 310-11 (1959).

[174]Langley v. State, 250 Ind. 29, 36, 232 N.E.2d 611, 615, *cert. denied*, 393 U.S. 835 (1968); Spight v. State, 248 Ind. 287, 291, 226 N.E.2d 895, 897 (1967); Groover v. State, 239 Ind. 271, 280, 156 N.E.2d 307, 311 (1959). In Lowe v. State, 298 N.E.2d 421 (Ind. 1973), appellant argued that his attorney failed to properly cross-examine various witnesses, particularly the key prosecution witness. Chief Justice Arterburn concluded that appellant had failed to show how the cross-examination was inadequate:

> It is true that defense counsel did not ask all the questions he could have asked, and did not explore all the details as minutely as is conceivable. Yet, he did attempt to test the recall and veracity of the prosecuting witnesses. . . . As most careful lawyers know, cross-examination can be a trap for the unwary. On many occasions, the decision whether or not to cross-examine, and if so, how to accomplish it, is one of the most difficult decisions a trial attorney has to make. It is not a decision that an appellate court can lightly second guess.

*Id.* at 422.

However, counsel's failure to cross-examine may constitute one aspect of inadequate representation. *See, e.g.*, Shack v. State, 249 Ind. 67, 72, 231 N.E.2d 35, 40 (1967); Blincoe v. State, 243 Ind. 387, 389, 185 N.E.2d 729 (1962).

[175]United States v. Izzi, 285 F.2d 412, 413 (7th Cir. 1967).

[176]*In re* Sobieski, 246 Ind. 222, 226-27, 204 N.E.2d 353, 356 (1965); Wagner v. State, 243 Ind. 570, 578, 188 N.E.2d 914, 918 (1963); Bays v. State, 240 Ind. 37, 50-51, 159 N.E.2d 393, 399 (1959), *cert. denied*, 361 U.S. 972 (1960); Hendrickson v. State, 233 Ind. 341, 343, 118 N.E.2d 493, 495 (1954); Stice v. State, 228 Ind. 144, 150-51, 89 N.E.2d 915, 918 (1950). However, counsel's failure to tender or object to instructions may contribute toward a finding of incompetency of counsel. *See, e.g.*, Lunce v. Overlade, 244 F.2d 108, 110 (7th Cir. 1957); Shack v. State, 249 Ind. 67, 80, 231 N.E.2d 67, 80, 231 N.E.2d 35, 40 (1967); Wilson v. State, 222 Ind. 63, 77, 51 N.E.2d 848, 854 (1943); Sanchez v. State, 199 Ind. 235, 243, 157 N.E. 1, 4 (1927).

tioning,[177] to prejudicial remarks by the prosecuting attorney,[178] to separation of the jury,[179] or to sentencing of defendant[180] necessarily constitute ineffectiveness of counsel.

## VI. Adequacy of Appellate Counsel

Incompetency challenges normally arise on appeal or during postconviction relief hearings. After the court appoints counsel to represent an indigent on appeal, such counsel may find no merit in appellant's allegations and wish to withdraw. The traditional Indiana view has been that a public defender, after proper investigation, is not obliged to pursue what he believes to be an obviously frivolous and futile appeal.[181] However, in

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[177]Isaac v. State, 274 N.E.2d 231, 237 (Ind. 1971); Langley v. State, 250 Ind. 29, 36, 232 N.E.2d 611, 615 (1968). Nevertheless, an attorney's failure to object to improper prosecution questioning may constitute one aspect of ineffective representation. *See, e.g.*, Sanchez v. State, 199 Ind. 235, 243, 157 N.E. 1, 4 (1927).

[178]Woods v. State, 255 Ind. 483, 265 N.E.2d 244 (1970). Appellant failed to prove that the remarks were "so gravely prejudicial" as to "conclusively seal his guilt." *Id.* at 490, 265 N.E.2d at 245. *But see* Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943), in which counsel's failure to object to flagrantly prejudicial remarks of the judge contributed toward a finding of ineffectiveness. The court emphasized: "A competent lawyer for the defense, very early in the trial, would by objection have reminded the judge of his judicial duty." *Id.* at 83, 51 N.E.2d at 855-56.

[179]In Baker v. State, 298 N.E.2d 445 (Ind. 1973), trial counsel agreed to a separation of the jury for six days after the trial had commenced because of the death of a juror's father. In holding counsel's conduct reasonable, the court observed:

> When faced with the factual situation of the death of the father of one of the jurors, counsel would most assuredly have prejudiced his client's case had he insisted that the trial continue, and that the affected jurors be forced to continue to serve notwithstanding his personal tragedy. Such conduct on the part of counsel would approach asininity and would itself have been far greater grounds for this court to declare incompetency than the course chosen to which appellant now so strongly objects.

*Id.* at 453. *See also* Packwood v. State, 244 Ind. 585, 591, 193 N.E.2d 494, 497 (1963), in which the court permitted a recess of thirty-nine days because of the illness of counsel.

[180]Lindsey v. State, 246 Ind. 431, 443, 204 N.E.2d 357, 364 (1965).

[181]State *ex. rel.* Henderson v. Boone Cir. Ct., 246 Ind. 207, 204 N.E.2d 346 (1965); Johnson v. Dowd, 244 Ind. 496, 193 N.E.2d 906 (1963), *cert. denied*, 376 U.S. 965 (1964); Brown v. State, 241 Ind. 298, 171 N.E.2d

*Anders v. California,*[182] the United States Supreme Court held that the court, not the public defender, must determine whether meritorious grounds exist for an appeal.[183] In 1972, the Indiana Court of Appeals in *Dixon v. State,*[184] went beyond *Anders* and held that Indiana postconviction rules prohibited a public defender from withdrawing from a case even if he felt the appeal was wholly frivolous.[185]

Once the court has appointed counsel, appellant may allege that the inadequacy of his appellate representation deprived him of the right to an effective appeal of his conviction. But the failure of appellate counsel to raise all those errors which appellant wishes him to raise does not constitute grounds for incompetency unless appellant can show he was thereby prejudiced.[186] Similarly,

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825, *cert. denied,* 366 U.S. 954 (1961); State *ex rel.* Casey v. Murray, 231 Ind. 74, 106 N.E.2d 911 (1952); State *ex rel.* White v. Hilgemann, 218 Ind. 572, 34 N.E.2d 129 (1941).

[182]386 U.S. 738 (1967).

[183]*Id.* at 744. The Court held that the public defender could withdraw if he utilized the following procedure. Counsel had to accompany his request for permission to withdraw with a brief summary of any evidence in the record that might arguably support an appeal. He also had to submit a copy to the indigent who might, in turn, respond to the court. Finally, if the court, after full examination of the proceedings, determined the appeal non-meritorious, it could allow the attorney to withdraw. *See also* Frazier v. Lane, 282 F. Supp. 240, 245 (N.D. Ind. 1968), in which the court, approving *Anders,* held violative of the equal protection clause Indiana's requirement that an indigent make a preliminary showing of merit in the appeal before the public defender could represent him.

[184]284 N.E.2d 102 (Ind. Ct. App. 1972).

[185]*Id.* at 106-07. The court adopted the position of the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES § 5.3 (Approved Draft 1968):

> Counsel should not seek to withdraw because he believes that the contentions of his client lack merit, but should present for consideration such points as the client desires to be raised provided he can do so without compromising professional standards.

The court emphasized that its previous rulings had been based upon an interpretation of IND. CODE § 33-1-7-5 (1971), which gave the public defender discretion regarding the pursuance of appeals. However, the new IND. P.C.R 1(9), it argued, mandated that the public defender represent indigents on appeal. 284 N.E.2d at 106.

[186]Black v. State, 246 Ind. 550, 207 N.E.2d 627 (1965); State *ex rel.* Henderson v. Boone Cir. Ct., 246 Ind. 207, 204 N.E.2d 346 (1965).

appellate counsel is not required to pursue all the specifications of error raised by the trial counsel in his motion for a new trial. In *Kidwell v. State,*[187] trial counsel alleged thirty-five errors at trial, but appellate counsel chose to press only three of the allegations. The court held that appellate counsel may evaluate the possible trial errors and choose the most meritorious ones to press on appeal.[188] Finally, appellate counsel is not incompetent because he fails to furnish appellant with a copy of appellee's brief for personal examination.[189]

## VII. Conclusion

As the cases herein reviewed indicate, Indiana courts have viewed incompetency allegations with great suspicion. They have implicitly considered incompetency charges against one member of the bar as a subtle attack upon the integrity of the entire legal profession.[190] A heavy burden of proof has been imposed upon an appellant to show that his attorney's representation rendered the proceedings a "mockery and a farce." The courts have rushed to the defense of attorneys by labeling their alleged errors and omissions as "strategy and tactics." Because they have required only a minimal level of effectiveness to defeat an incompetency challenge, appellants have faced only slight prospects of ever winning such a contest.[191]

It would appear that the recent flurry of incompetency petitions from convicted prisoners has made the courts even less sensitive to such petitions. Admittedly, judges face a burdensome task of distinguishing the few meritorious allegations from the

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[187]295 N.E.2d 362 (Ind. 1973).

[188]*Id.* at 364-65.

[189]Black v. State, 246 Ind. 550, 207 N.E.2d 627 (1965).

[190]The Indiana Supreme Court impliedly expressed such an attitude, for example, in the case of *In re* Sobieski, 246 Ind. 222, 204 N.E.2d 353 (1965):

> Such allegations [of incompetency of counsel] constitute a grave attack on the character and ability of a duly admitted member of the bar of this state and are not to be taken lightly. The presumption is in favor of the competency of such counsel.

*Id.* at 224, 204 N.E.2d at 355.

[191]*See* the honest appraisal of Justice DeBruler in Conley v. State, 284 N.E.2d 803, 811 (Ind. 1972).

many frivolous ones. Certainly, the "mockery or farce" standard renders this task easier. But as recently applied in Indiana, this standard implies that an incompetent attorney must be guilty of intentional misconduct or near-total inaction. However, earlier Indiana cases have held that the constitutional mandate for *effective* counsel demands more than such perfunctory service by attorneys for their clients.[192]

Indiana has made substantial progress in its legal system since its first case dealing with incompetency of counsel in 1925. The quality of legal education in the state has vastly improved. Applicants for admission to the bar today must be graduates of recognized law schools and must pass an increasingly stringent bar examination. The state has instituted a system for handling representation for indigent criminal defendants at the trial, post-conviction, and appellate levels. The Indiana Supreme Court has established an effective method of disciplining negligent attorneys.[193]

Indiana courts should reconsider their standards and the application of those standards in light of this progress and in view of recent federal court decisions. The United States Court of Appeals for the District of Columbia Circuit gave impetus to the "mockery or farce" standard in the landmark case of *Mitchell v. United States*[194] in 1958. However, cases from that circuit in the past three years have expressly disapproved the strictness of that criterion.[195] Indiana courts should consider the new standard

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[192]Wilson v. State, 222 Ind. 63, 80, 51 N.E.2d 848, 855 (1943); Sanchez v. State, 199 Ind. 235, 245, 157 N.E. 1, 5 (1927); Castro v. State, 196 Ind. 385, 391, 147 N.E. 321, 323 (1925).

[193]Disciplinary actions have included permanent disbarment and temporary suspensions from practice. *See In re* Healey, 295 N.E.2d 594 (Ind. 1973); *In re* Perrello, 295 N.E.2d 357 (Ind. 1973); *In re* Taylor, 293 N.E.2d 779 (Ind. 1973); *In re* Underwood, 286 N.E.2d 828 (Ind. 1972); *In re* Ewing, 283 N.E.2d 536 (Ind. 1972); *In re* Gibbs, 271 N.E.2d 729 (Ind. 1971).

Shack v. State, 249 Ind. 67, 81, 231 N.E.2d 35, 45 (1967) (Arterburn, J., concurring), is the only Indiana incompetency case in which the court recommended disciplinary action be taken against the negligent attorney.

[194]259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

[195]In Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970), the court stated that the "mockery" standard existed only as a "metaphor." It concluded that since its retention even as a figure of speech tended to confuse rather than clarify, courts should drop the language altogether. *Id.* at 610. *See also* Bruce v. United States, 379 F.2d 112, 116-17 (D.C. Cir. 1967).

evolving in that circuit: that appellant has the burden of demonstrating "requisite unfairness" by showing that his attorney's "gross incompetence blotted out the essence of a substantial defense."[196] Most recently, the United States Supreme Court in *Tollett v. Henderson*[197] outlined a standard of competency which may also serve to guide Indiana courts. In *Tollett*, appellant pleaded guilty to first degree murder on advice of counsel and was convicted and sentenced to life imprisonment in 1948. On appeal, he argued that his plea of guilty was not based upon competent advice because the indictment to which he pleaded was returned by an unconstitutionally selected grand jury. Justice Rehnquist, writing for the majority, agreed that criminal counsel has a duty to reasonably inform himself of and evaluate those facts which may give rise to a possible constitutional claim.[198] The standard, he concluded, was whether the resulting advice was "within the range of competence demanded of attorneys in criminal cases."[199]

The fair and conscientious judicial application of these standards is equally important. Indiana courts should examine the entire record to determine that "substantial justice" was achieved and that no constitutional rights were violated.[200] In weighing the testimony of the attorney involved, they should recognize the great pressure upon him to defend his own reputation and should resist the natural tendency to automatically resolve any conflict

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[196]*Id. See also* Matthews v. United States, 449 F.2d 985, 994 (D.C. Cir. 1971); United States v. Hammonds, 425 F.2d 597, 601 (D.C. Cir. 1970); United States v. Tucker, 328 F. Supp. 1312, 1313 (D.D.C. 1971). The more liberal test was also adopted by the court in Monsour v. Cady, 342 F. Supp. 353, 359 (E.D. Wis. 1972).

[197]93 S. Ct. 1602 (1973).

[198]*Id.* at 1608.

[199]*Id.* The majority and dissenting opinions disagreed as to whether a reasonable criminal lawyer in Tennessee in 1948 would have objected to the racial composition of the grand jury. The majority concluded that this was a peripheral issue and the appellant was adequately advised. *See also* McMann v. Richardson, 397 U.S. 759 (1970).

[200]This test was recognized in Stice v. State, 228 Ind. 144, 152, 89 N.E.2d 915, 918 (1950). *See also* People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957);

> However, even without exploring the issue of whether defendant's representation was such as to reduce the trial to a sham or farce, it is our opinion that the total facts, peculiar to this case, disclose a violation of the ideas of fundamental fairness and right which attaches to present-day concepts of due process of law.

in the facts in favor of a fellow member of the bar.[201] Nor should judicial fears of prolonged litigation prevent a careful examination of an appellant's petition, for as Justice Brennan once emphasized: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."[202] By diligently enforcing these higher standards, Indiana courts will encourage more conscientious and faithful representation, will help fulfill the constitutional command of effective counsel, and will ultimately heighten public esteem for the legal system.

JEFFREY J. LEECH

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*Id.* at 272-73, 146 N.E.2d at 24.

[201]*See* Conley v. State, 284 N.E.2d 803, 811 (Ind. 1972) (DeBruler, J., dissenting).

[202]Sanders v. United States, 373 U.S. 1, 8 (1963).

# RISK OF LOSS UNDER THE UNIFORM COMMERCIAL CODE

## I. INTRODUCTION

The wide variety of ways in which goods can be damaged, destroyed, or lost after parties have contracted for the sale of those goods creates the need for a simple and workable set of legal rules allocating risk of loss between the contracting parties. The complexity of modern commercial practices underscores this need. A common example illustrates the problem. A men's clothing dealer in New York sends a purchase order for three hundred custom shirts to a manufacturer in Indiana. The manufacturer fills the order and ships the shirts by truck to the buyer in New York. However, before delivery can be made, the shirts are totally destroyed by a fire at a truck terminal.

Who bears the risk of loss in this situation? The question is of direct monetary interest to both of the contracting parties, for if the seller bears the risk of loss, he is liable in damages for nondelivery.[1] The buyer is liable for the price if the risk of loss falls on the buyer.[2] The Uniform Commercial Code (UCC) has noticeably changed the law of risk of loss as it existed under the common law and the Uniform Sales Act. This note presents an explanation of the manner in which risk of loss is allocated between contracting parties pursuant to the UCC and examines problems which have arisen and may arise by application of the UCC's risk of loss provisions.[3]

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[1] UNIFORM COMMERCIAL CODE [hereinafter cited as UCC] § 2-713.

[2] *Id.* § 2-709; *see* Park County Implement Co. v. Craig, 397 P.2d 800, 802-03 (Wyo. 1964).

[3] *See generally* 2 R. ANDERSON, UNIFORM COMMERCIAL CODE 101-15 (1971); 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.23, at 131-44 (1964); R. NORDSTROM, HANDBOOK OF THE LAW OF SALES §§ 130-36 (1970); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 5, at 134-66 (1972); 6B W. WILLIER & F. HART, BENDER'S UNIFORM COMMERCIAL CODE SERVICE 489-94 (1973); Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 581-84 (1950); Comment, *Risk of Loss and the Uniform Commercial Code: The Unlamented Passing of Title*, 13 KAN. L. REV. 565 (1965); Comment, *Commercial Transactions: Risk of Loss: What Does the Code Mean by Bailee?*, 21 OKLA. L. REV. 310 (1968); Comment, *The Status of the Concept of Title in Article II of the Uniform Commercial Code*, 37 ST. JOHN'S L. REV. 178 (1962).

Codifying the common law,[4] the Uniform Sales Act put the risk of loss on the party having legal title to the goods.[5] Thus, if title had not yet passed to the buyer, the seller bore the risk of loss.[6] If title had passed to the buyer, he was liable for the price and thus bore the risk of loss. The passage of risk of loss with the passage of title allowed the risk of loss to shift to the buyer under circumstances in which the seller remained in possession of the goods.[7] The inequity caused by allowing passage of title to determine the risk of loss was apparent since the risk could fall upon the party least likely to have prepared against such loss. In addition, the uncertainty in the law relating to title prompted needless litigation under the Uniform Sales Act's risk of loss provision.[8]

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[4]R. BRAUCHER & A. SUTHERLAND, COMMERCIAL TRANSACTIONS 187-88 (4th ed. 1968); L. VOLD, HANDBOOK OF THE LAW OF SALES § 38, at 225 (2d ed. 1959); *see, e.g.*, California State Automobile Ass'n Inter-Ins. Bureau v. Dearing, 259 Cal. App. 2d 717, 66 Cal. Rptr. 852 (1968).

[5]Section 22 of the Uniform Sales Act provided the general rules as to risk of loss. Section 22 provided in full:

> Section 22.—[Risk of Loss.] Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that—
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> (a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligation under the contract, the goods are at the buyer's risk from the time of such delivery.
>
> (b) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

[6]One exception to the general rule resulted when the parties acted under a security agreement, such as a conditional sales contract, by which the seller retained title for security purposes, while the buyer obtained beneficial ownership. Here, risk of loss shifted to the buyer with the passage of beneficial ownership. UNIFORM SALES ACT § 22(a). The second exception to the general rule placed the risk of loss on the party in fault when the delivery of goods was delayed through the fault of either the buyer or the seller. *Id.* § 22(b).

[7]The Uniform Sales Act provided that under an unconditional sales contract, title to specific goods passed when the contract was made. Time of payment and delivery were immaterial. *Id.* § 19, Rule 1.

[8]*See, e.g.*, Parish & Parish Mining Co. v. Serodino, Inc., 52 Tenn. App. 196, 372 S.W.2d 433 (1963).

The Code's approach to risk of loss does not depend upon the inadequate principle of passage of title.[9] Rather, the drafters of the Code state that "[t]he underlying theory of these sections on risk of loss is the adoption of the contractual approach rather than an arbitrary shifting of the risk with the 'property' in the goods. . . ."[10] The basic policy behind the Code's risk of loss provisions is that the risk of loss should fall upon the party most likely to have insured or otherwise taken precautions against such loss. This general policy manifests itself in provisions in which the allocation of risk of loss turns upon such factors as which party has possession of the goods or which party retains the most control over the goods. The application of this general policy is logically sound. For example, one provision of the UCC places the risk of loss on the party having possession of the goods.[11] Assume a merchant-seller has contracted to sell specific goods, but retains possession. Most likely, the merchant-seller's insurance policy covers all goods on his premises. By placing the risk of loss on the party having possession of the goods, the merchant-seller, the Code has placed the burden on the party most likely to have insured against the loss. By fashioning rules around this basic policy, the drafters provide for the allocation of risk of loss in a simple, clear manner which is workable in today's complex commercial setting.

## II. Section 2-509—Risk of Loss in the Absence of Breach

### *A. General Application*

Section 2-509 sets forth the method of determining whether the buyer or the seller bears the risk of loss when neither party has breached the contract. This section is strictly confined to the

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[9]UCC § 2-401 specifically provides in part:

> Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchaser or other third parties applies irrespective of title to the goods except where the provision refers to such title.

*See* Silver v. Sloop Silver Cloud, 259 F. Supp. 187, 192 (S.D.N.Y. 1966); William F. Wilke, Inc. v. Cummins Diesel Engines, Inc., 252 Md. 611, 250 A.2d 886, 889 (1969); Hayward v. Postma, 31 Mich. App. 720, 188 N.W.2d 31, 32 (1971); Park County Implement Co. v. Craig, 397 P.2d 800, 802 (Wyo. 1964); Carrington, *Uniform Commercial Code Section: The Passage of Title*, 14 Wyo. L.J. 17, 25 (1959); Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 Harv. L. Rev. 561, 581 (1950); Comment, *The Status of the Concept of Title in Article II of the Uniform Commercial Code*, 37 St. John's L. Rev. 178 (1962).

[10]UCC § 2-509, Comment 1.

[11]*Id.* § 2-509(3).

no-breach situation,[12] although actions by either party or defects in the goods which do not constitute a breach would fall within the application of this section.[13] Section 2-509[14] classifies the no-breach situation into three basic categories: (1) When the parties have entered into a contract calling for goods to be shipped by carrier, subsection (1) applies; (2) Subsection (2) allocates the risk of loss under circumstances in which the goods are held by a bailee to be delivered without being moved; (3) If the contract contains no provision as to delivery, the residuary provision, subsection (3), determines who bears the risk of loss. Significantly, the parties may avoid the Code's allocation of risk of loss by entering into a specific contractual agreement with respect to risk of loss. Section 2-509(4) provides in part that "[t]he provisions of this section are subject to contrary agreement of the parties . . . ."[15] Thus, assuming the contractual provision is sufficiently clear to be valid,[16] the parties may themselves determine the specifics of who bears the risk of loss.

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[12]*Id.* § 2-509, Comment 1 explains the drafters' intent as to the application of this section:

> The scope of the present section, therefore, is limited strictly to those cases where there has been no breach by the seller. Where for any reason his delivery or tender fails to conform to the contract, the present section does not apply and the situation is governed by the provisions on effect of breach on risk of loss.

*Cf.* Sunbury Wire Rope Mfg. Co. v. United States Steel Corp., 129 F. Supp. 425 (E.D. Pa. 1955).

[13]*See* R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 132, at 399-400 (1970).

[14]For a case discussing the general application of section 2-509 and the distinctions among its subsections, see Mercanti v. Pearson, 160 Conn. 468, 280 A.2d 137 (1971).

[15]UCC § 2-509(4); *cf.* Consolidated Bottling Co. v. Jaco Equip. Corp., 442 F.2d 660 (2d Cir. 1971). UCC § 2-509, Comment 5 supports the contrary agreement rule and also states:

> "Contrary" is in no way used as a word of limitation and the buyer and seller are left to readjust their rights and risks as declared by this section in any manner agreeable to them. Contrary agreement can also be found in the circumstances of the case, a trade usage or practice, or course of dealing or performance.

Note that section 2-509(4) also provides that the provisions of this section do not apply to a sale on approval.

[16]It should be emphasized that an agreement determining the allocation of risk of loss must contain language which clearly and unequivocally calls for that result. For example, in Hayward v. Postma, 31 Mich. App. 720, 188

### *B. Section 2-509(1)*

#### *1. Delivery Terms*

In order to understand the Code's allocation of risk of loss when the parties have contracted for shipment of the goods, common delivery terms must be examined. These shorthand terms were developed by merchants to distinguish between "shipment" and "destination" contracts. In short, a shipment contract requires only that the seller place the goods in the hands of the carrier in order to shift the risk of loss to the buyer. On the other hand, a destination contract places the risk of loss on the seller until the carrier actually delivers the goods to the buyer. The Code adopts these common delivery terms[17] and allocates risk of loss according to whether the parties have agreed to a shipment or destination contract.[18]

Pursuant to section 2-320, both "C.I.F." (cost, insurance, and freight) and "C.F." (cost and freight) contracts are considered shipment contracts, requiring the seller to bear the expense and risk of loss of putting the goods into the possession of the carrier.[19] The price of a C.I.F. contract includes the cost of the goods plus the cost of insurance and freight to the specified destination, while the price of a C.F. contract includes the cost of the goods plus freight.[20] The C.I.F. delivery term logically indicates a shipment

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N.W.2d 31 (1971), the Michigan Court of Appeals held that a provision in a security agreement by which the buyer was to keep the goods fully insured at all times was not a contrary agreement to which section 2-509(4) would apply.

[17] *See, e.g.*, UCC §§ 2-319 to -324.

[18] *Id.* § 2-509(1).

[19] *Id.* § 2-320(2). *Id.* § 2-320, Comment 1 states in part:

> The C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods. Delivery to the carrier is delivery to the buyer for purposes of risk and "title". . . .

*See also* York-Shipley, Inc. v. Atlantic Mut. Ins. Co., 474 F.2d 8 (5th Cir. 1973).

[20] UCC § 2-320(1); *see* Amco Transworld, Inc. v. M/V Bambi, 257 F. Supp. 215 (S.D. Tex. 1966); Continental Ore Corp. v. United States, 423 F.2d 1248 (Ct. Cl. 1970). Unless otherwise agreed, the C.I.F. delivery term imposes the obligation on the seller, at his expense and risk, to (1) put the goods in the carrier's possession and obtain a negotiable bill of lading on the shipment, (2) load the goods and obtain a paid freight receipt, (3) obtain

contract because the buyer has specifically contracted to insure against the risk of loss on the goods. However, a less obvious, but more practical reason underlies the classification of the C.F. delivery term as a shipment contract. The buyer usually has a blanket insurance policy covering all shipments made by or to him.[21] These rules support the drafter's intent to place the risk of loss on the party most likely to have insured against the loss.

The delivery terms "F.O.B." (free on board) and "F.A.S." (free alongside) may indicate either shipment or destination contracts. Pursuant to section 2-319,[22] by using the delivery term

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the policy or certificate of insurance of the usual kind and amount, (4) prepare an invoice and any other necessary documents, (5) forward and tender those documents with commercial promptness and with necessary indorsements to the buyer. UCC § 2-320(2). These same obligations fall upon a seller under a C.F. delivery term, except that the C.F. term imposes no insurance obligation. *Id.* § 2-320(3).

[21] UCC § 2-320, Comment 16.

[22] *Id.* § 2-319 provides in full:

> (1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which
>
> (*a*) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or
>
> (*b*) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (section 2-503);
>
> (*c*) when under either (*a*) or (*b*) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (section 2-323).
>
> (2) Unless otherwise agreed the terms F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must
>
> (*a*) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and
>
> (*b*) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.
>
> (3) Unless otherwise agreed in any case falling within subsections (1) (*a*) or (*c*) or subsection (2) the buyer must seasonably

"F.O.B. place of shipment," the seller is obligated under the shipment contract to bear the expense and risk of loss of putting the goods in the possession of the carrier, and he must comply with the requirements of section 2-504.[23] On the other hand, when the delivery term "F.O.B. place of destination" is used, the seller is obligated to bear the risk of loss to the place of destination, and he must comply with the requirements of section 2-503.[24] Similarly, the risk of loss passes at the named destination under a "F.A.S." contract.[25] The delivery term "ex-ship" also denominates a destination contract.[26]

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give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this Article (section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

[23]*Id.* § 2-319(1)(a). Section 2-504 provides that under a shipment contract the seller must (1) place the goods in the possession of a carrier and, with regard to the nature of the goods and other circumstances of the case, make a reasonable transportation contract, (2) obtain and deliver the proper documents of title, and (3) promptly notify the buyer of the shipment. *See* Permalum Window & Awning Mfg. Co. v. Permalum Window Mfg. Corp., 412 S.W.2d 863 (Ky. Ct. App. 1967). However, section 2-504 also states that failure to notify pursuant to paragraph (a) constitutes grounds for rejection only in the case of material delay or loss.

[24]UCC § 2-319(1)(b). Section 2-503 provides that for a destination contract the seller must make a proper tender of delivery. More specifically, the seller is required to tender conforming goods and give the buyer any notification reasonably necessary to enable him to take delivery. *Id.* § 2-503(1). Although the manner, time, and place of tender are determined by the contract of the parties, the seller is required to make tender at a reasonable hour and to keep the goods available for delivery for a reasonable period. *Id.* § 2-503(1)(a). The buyer, unless otherwise agreed, must provide delivery facilities reasonably suited for the receipt of the goods. *Id.* § 2-503(1)(b). The seller is further obligated to tender the proper documents of title. *Id.* § 2-503(3).

[25]*Id.* § 2-319(2).

[26]*Id.* § 2-322. Under the "ex-ship" term, the seller has the obligation to deliver by ship to the named destination, to discharge all leins against the goods, and to remove the goods from the ship's tackle. *Id.*

### 2. *Allocation of Risk of Loss*

Adopting the common delivery terms used by merchants, section 2-509(1) allocates the risk of loss when the parties are operating under a transportation contract according to whether the parties have agreed to a shipment or a destination contract. Subsection (1) states:

> Where the contract requires or authorizes the seller to ship goods by carrier
>
> (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but
>
> (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable buyer to take delivery.[27]

Thus, when the parties are operating under a transportation contract which requires or authorizes the seller to ship the goods by carrier, paragraph (a) passes the risk of loss when the goods are duly delivered to the carrier if the parties have agreed to a shipment contract. If, on the other hand, a destination contract is involved, paragraph (b) provides that the risk of loss does not pass until the goods are so tendered to the buyer that he may take delivery.

A definitional problem exists with regard to the use of the term "carrier" since the term is not defined by the Code. However, the implication of the Code is that carrier is used in its normal sense to mean an enterprise in the business of transporting the goods of others for commercial gain.[28] Thus, subsection (1) would not apply to a seller shipping goods by means of his own vehicles. An interpretative problem is created under a transportation contract which does not explicitly state whether it is a shipment or

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[27] *Id.* § 2-509(1).

[28] *See* R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 132, at 396-97 (1970); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 5-2, at 143-44 (1972). *See also* Mercanti v. Pearson, 160 Conn. 468, 280 A.2d 137, 139 (1971).

a destination contract.[29] Forseeing this problem, the drafters intended that there be a presumption in favor of shipment contracts. Accordingly, unless the parties explicitly provide for a destination contract, the contract will be construed as a shipment contract. Stated differently, all ambiguous transportation contracts will be construed as shipment contracts.[30]

Under a shipment contract, pursuant to section 2-509(1)(a), the risk of loss passes to the buyer when the goods are "duly delivered." The term "duly delivered" is not defined by the UCC. But, again, the drafters' intent is clear. In Comment 2 to section 2-509, the drafters state:

> In order that the goods be "duly delivered to the carrier" under paragraph (a) a contract must be entered into with the carrier which will satisfy the requirements of the section on shipment by the seller and the delivery must be made under circumstances which will enable the seller to take any further steps necessary to a due tender.[31]

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[29]UCC § 2-503, Comment 5 provides in part:

> [U]nder this Article the "'shipment" contract is regarded as the normal one and the "destination" contract as the variant type. The seller is not obligated to deliver at a named destination and bear the concurrent risk of loss until arrival, unless he has specifically agreed so to deliver or the commercial understanding of the terms used by the parties contemplates such delivery.

*See also id.* § 2-509, Comment 2.

The courts have followed the drafters' intent and have held that there is a presumption in favor of shipment contracts. In Electric Regulator Corp. v. Sterling Extruder Corp., 280 F. Supp. 550 (D. Conn. 1968), a Connecticut seller contracted to sell and ship goods to a New Jersey buyer. The district court construed the "F.O.B. Norwalk, Conn." delivery term as a shipment contract by using the shipment contract presumption. *Id.* at 558; *accord*, Ninth St. E., Ltd. v. Harrison, 5 Conn. Cir. 597, 259 A.2d 772 (1968); Dana Debs, Inc. v. Lady Rose Stores, Inc., 65 Misc. 2d 697, 319 N.Y.S.2d 111 (Civ. Ct. 1970).

[30]Ninth St. E., Ltd. v. Harrison, 5 Conn. Cir. 597, 259 A.2d 772 (1968); Dana Debs, Inc. v. Lady Rose Stores, Inc. 65 Misc. 2d 697, 319 N.Y.S.2d 111 (Civ. Ct. 1970); Lumber Sales, Inc. v. Brown, 469 S.W.2d 888 (Tenn. Ct. App. 1971).

In Electric Regulator Corp. v. Sterling Extruder Corp., 280 F. Supp. 550, 557 (D. Conn. 1968), the district court stated, "Thus, an F.O.B. term must be read to indicate the point at which delivery is to be made unless there is a specific agreement otherwise. . . ."

[31]UCC § 2-509, Comment 2. This interpretation is also supported by the fact that paragraph (a) of section 2-319(1), which deals with shipment

The requirements of shipment by the seller are contained in section 2-504, which provides that the seller must: (1) place the goods in the possession of a carrier, and, with regard to the nature of the goods and other circumstances of the case, make a reasonable transportation contract, (2) obtain and deliver the proper documents of title, and (3) promptly notify the buyer of the shipment.[32] Thus, goods are "duly delivered" pursuant to section 2-509(1)(a) if they conform to the contract, and if the requirements of section 2-504 are met by the seller.

Under a destination contract, pursuant to section 2-509(1)(b), the risk of loss shifts to the buyer at the place of destination if the goods are "duly so tendered as to enable the buyer to take delivery."[33] A parallel reading with paragraph (a) would require the seller to comply with the requirements of shipment under a destination contract as set forth in section 2-503.[34] To make a proper tender of delivery pursuant to this section, the seller is required to tender conforming goods and to give the buyer any notification reasonably necessary to enable buyer to take delivery.[35] Although the manner, time, and place of tender are determined by the contract of the parties, the seller is required to make tender at a reasonable hour and to keep the goods available for delivery for a reasonable period.[36] The seller is further obligated to tender the proper documents of title.[37]

In a sense, the application of subsection (1) produces a somewhat consistent result under either a shipment or a destination contract. In both cases the seller initially begins with the risk of loss. Through compliance with the requirements of tender under the applicable Code provisions, the seller may shift the burden of the risk of loss. The difference in results stems from the distinction between a shipment and a destination contract—a distinction created by merchants themselves. For parties operating pur-

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contracts under the F.O.B. delivery terms, specifically requires the seller to comply with section 2-504. *See* note 23 *supra*.

[32]UCC § 2-504.

[33]*Id.* § 2-509(1)(b).

[34]This interpretation is supported by section 2-509, Comment 2, and by section 2-319(1)(b). *See* note 24 *supra*.

[35]UCC § 2-503(1).

[36]*Id.* § 2-503(1)(a).

[37]*Id.* § 2-503(3).

suant to a shipment contract, the burden passes upon delivery to the carrier, while under the destination contract the burden does not shift until delivery to the buyer at the place of destination.

The New York Civil Court case of *Dana Debs, Inc. v. Lady Rose Stores, Inc.*,[38] properly illustrates the application of subsection (1). The plaintiff, a dress and suit manufacturer in New York City, received an order for certain garments from the defendant buyer on buyer's printed form. Defendant's firm was located in Long Island. Shipment terms on the bill of sale were "Terms, F.O.B., N.Y.C." Plaintiff sued for the price of the garments after the shipment was lost by the carrier. Plaintiff's recovery thus turned on who bore the risk of loss after the goods were delivered to the carrier. The court, holding that the parties had agreed to a shipment contract, allowed the plaintiff to recover.[39] The court reasoned that the parties had not explicitly agreed to a destination contract. Therefore, a shipment contract was presumed.[40] The court supported its position by pointing out that the seller was located in New York City, while the buyer was located outside New York City. The "F.O.B., N.Y.C." term thus indicated an F.O.B. place of shipment term, which denominated a shipment contract.[41] Accordingly, the risk of loss passed to the buyer when the seller properly tendered the goods to the carrier.

### *C. Section 2-509(2)*

#### *1. Bailment Terms*

It has been a common business practice for the owner of goods to place those goods in the possession of a third party who has the obligation to return the goods or dispose of them as the owner directs. This common business practice is defined in the law as a "bailment,"[42] the owner of the goods being the bailor and the third party in whose possession the goods are placed, the bailee. Of great legal consequence is the fact that the bailor retains

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[38]65 Misc. 2d 697, 319 N.Y.S.2d 111 (Civ. Ct. 1970). *See also* Electric Regulator Corp. v. Sterling Extruder Corp., 280 F. Supp. 550 (D. Conn. 1968); Ninth St. E., Ltd. v. Harrison, 5 Conn. Cir. 597, 259 A.2d 772 (1968); Sternheim v. Silver Bell, Inc., 66 Misc. 2d 726, 321 N.Y.S.2d 965 (N.Y.C. City Ct. 1971).

[39]65 Misc. 2d at 698, 319 N.Y.S.2d at 112.

[40]*Id.*

[41]*Id.* at 699, 319 N.Y.S.2d at 113.

[42]*See, e.g., In re* George L. Nadell & Co., 294 Mich. 150, 292 N.W. 684, 686 (1940); Hardin v. Grant, 54 S.W.2d 189, 190 (Tex. Civ. App. 1932).

ownership of the goods, while the bailee retains possession. This division of ownership and possession would create difficulty for the bailor who, desiring to sell the bailed goods or to borrow using the bailed goods as collateral, does not want to physically move those goods.

Fortunately, possible difficulties arising from the division of ownership and possession in bailed goods have been minimized by the legal concept of "documents of title." Simply stated a document of title is a piece of paper which represents title to specific goods.[43] Accordingly, the bailor may sell or borrow on bailed goods by simply transferring the document of title without physically moving the goods. Documents of title may either be negotiable or nonnegotiable. To be negotiable, a document of title must contain order or bearer language.[44] Any other document of title is nonnegotiable.[45]

When the bailor of goods[46] places those goods in the possession of the bailee,[47] called a warehouseman,[48] under a bailment agreement, the warehouseman often issues a document of title called a "warehouse receipt," which may either be negotiable or non-

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[43]UCC § 1-201(15) defines a document of title and alludes to the bailment concept:

> "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

*See also id.* § 1-201, Comment 15.

[44]*Id.* § 7-104(1)(a).

[45]*Id.* § 7-104(2).

[46]" 'Goods' means all things which are treated as movable for the purposes of a contract of storage or transportation." *Id.* § 7-102(1)(f).

[47]

> "Bailee" means the person who by a warehouse receipt, bill of lading or other document of title acknowledges possession of goods and contracts to deliver them.

*Id.* § 7-102(1)(a).

[48]" 'Warehouseman' is a person engaged in the business of storing goods for hire." *Id.* § 7-102(1)(h).

negotiable. When a negotiable document of title is issued, the Code imposes special obligations on both the holder of the document and the bailee. More specifically, the holder

> must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery thereon or be liable to any person to whom the document is duly negotiated.[49]

No such obligation arises under the Code with the issuance of a nonnegotiable document of title. For this reason, the negotiable document is the only document of title which represents true and absolute title to the goods.[50]

Since the bailor is not obligated to surrender a nonnegotiable document and since the bailee is not obligated to demand surrender of a nonnegotiable document in order to release the goods in his possession,[51] another document, "the delivery order,"[52] is commonly used in transactions involving a nonnegotiable document of title. The delivery order is a written order from the bailor to the bailee which directs the bailee to surrender the goods and states to whom the goods are to be delivered.[53] It is evident that goods may have been delivered under a delivery order while one or several nonnegotiable documents remain outstanding since the bailee is not required to demand the surrender of a nonnegotiable document in order to deliver the goods.[54]

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[49]*Id.* § 7-403(3). For other obligations placed on the bailee, see *id.* § 7-403(1).

[50]The nonnegotiable document of title is merely written evidence of the contract between the bailor and the bailee, and usually states the obligations of that contract upon the bailee.

[51]*See* note 49 *supra* & accompanying text. *See also* UCC § 7-504(2).

[52]UCC § 7-102(1)(d) defines the delivery order as follows:

> "Delivery order" means a written order to deliver goods directed to a warehouseman, carrier or other person who in the ordinary course of business issues warehouse receipts or bills of lading.

[53]Note that Comment 3 to section 102 states in part:

> When a delivery order has been accepted by the bailee it is for practical purposes indistinguishable from a warehouse receipt. Prior to such acceptance there is no basis for imposing obligations on the bailee other than the ordinary obligation of contract which the bailee may have assumed to the depositor of the goods.

[54]Note also that the rights of a holder of an nonnegotiable document may be defeated by creditors of the seller, other buyers from the seller, or the bailee. UCC § 7-504(2).

### 2. *Allocation of Risk of Loss*

Section 2-509(2) allocates the risk of loss under circumstances in which goods are held by a bailee to be delivered without being moved. Subsection (2) provides:

> Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer
>
> (a) on his receipt of a negotiable document of title covering the goods; or
>
> (b) on acknowledgement by the bailee of the buyer's right to possession of the goods; or
>
> (c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503.[55]

The basic principle underlying subsection (2) is that the risk of loss falls upon the party who has control over the bailee. This principle is based upon, or is at least consistent with, the principle underlying all the Code's risk of loss provisions that the risk of loss should fall upon the party most likely to have insured or taken precautions against such loss.[56]

The rule of section 2-509(2)(a) regarding passage of risk of loss when a negotiable document[57] covers the goods is simply that "the risk of loss passes to the buyer on his receipt of a negotiable document of title covering the goods."[58] The bailee is obligated to surrender the goods in this situation, and the buyer is likely to have obtained insurance covering the goods. The rule governing risk of loss after the issuance of a nonnegotiable document of title[59] is by nature more complex. Indeed, section 2-509(3) specifically mandates that risk of loss will pass to the buyer after

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[55] *Id.* § 2-509(2).

[56] *See* note 10 *supra* & accompanying text. *See also* UCC § 2-509, Comment 3.

[57] *See* note 44 *supra* & accompanying text.

[58] UCC § 2-509(2)(a). Although receipt of a negotiable document of title is not defined by the Code, receipt with regard to goods is defined as the taking of actual possession of the goods. *See id.* § 2-103(1)(c). Consistency would demand a similar definition with regard to documents of title.

[59] *See* note 45 *supra* & accompanying text.

his receipt of the nonnegotiable document or other written direction to deliver, such as a delivery order,[60] according to the rule of section 2-503(4)(b). Pursuant to section 2-503(4)(b),

> *risk of loss* of the goods and any failure by the bailee to honor the non-negotiable document of title or to obey the direction *remains on the seller until the buyer has had a reasonable time to present the document or direction*, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.[61]

Thus, when a nonnegotiable document of title covers the goods, risk of loss does not pass with receipt of the document as in the case of a negotiable document. Instead, the buyer has a reasonable time to present the bailee with the nonnegotiable document or delivery order.[62] Because the bailee may refuse to deliver the goods upon the surrender of a nonnegotiable document, section 2-503(4)(b) further provides that the bailee's refusal defeats the tender of the document and thus defeats passage of risk of loss. The latter provision of paragraph (b) protects the buyer for a practical reason, *i.e.*, the buyer who holds a nonnegotiable document can lose his rights to creditors of the seller, to the bailee, or to other purchasers from the seller from whom the bailee has previously accepted other documents and to whom the bailee has delivered the goods.[63]

The possibility exists that the bailee will not issue a document of title when the bailed goods are placed in his possession. Similarly, the bailor may not issue a direction for the bailee to deliver the goods to the buyer. When no document of title or direction to deliver is involved, and goods are held by a bailee

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[60] *See* note 52 *supra* & accompanying text.

[61] UCC § 2-503(4)(b) (emphasis added).

[62]

> Paragraph (b) of subsection (4) adopts the rule that between the buyer and the seller the risk of loss remains on the seller during a period reasonable for securing acknowledgment of the transfer from the bailee, while as against all other parties the buyer's rights are fixed as of the time the bailee receives notice of the transfer.

*Id.* § 2-503, Comment 6.

[63] *Id.* § 7-504(2). *See also* note 49 *supra* & accompanying text.

to be delivered without being moved, section 2-509(2)(b) provides that "the risk of loss passes to the buyer on acknowledgement by the bailee of the buyer's right to possession of the goods."[64] After acknowledgement by the bailee, the buyer has complete control over the goods and is likely to have procured insurance covering those goods. Thus, risk of loss should logically pass to him after the bailee's acknowledgement of the buyer's rights in the goods.

One possible drafting defect in section 2-509(2) which presents a litigable issue arises from the fact that the subsection does not place a limitation upon who may be considered a bailee.[65] Consider a situation in which a seller remains in possession of goods previously sold to a buyer. The seller agrees to store the goods until delivery to the buyer, but the goods are destroyed while in the seller's possession. In this situation, the seller might contend that he is a bailee under subsection (2), that he acknowledged the buyer's rights in the goods, and that section 2-509(2)(b) thus mandates placing risk of loss on the buyer. Such a contention seems erroneous. Indeed, including the seller as a bailee under subsection (2) would be contrary to the basic policy underlying the Code's risk of loss provisions, for the merchant-seller is likely to have insurance which covers goods remaining in his possession. It is also arguable that the drafters did not intend such an interpretation of the term bailee under subsection (2).[66]

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[64]UCC § 2-509(2)(b). In Whately v. Tetrault, 5 UCC REP. SERV. 838 (Mass. App. 1964), a boat and trailer held by a bailee were sold by the owner, and the buyer subsequently made arrangements with the bailee to take possession of the boat. The court held that the making of arrangements for the buyer to take possession of the boat and trailer was an acknowledgment by the bailee of the buyer's rights in the goods sufficient to shift the risk of loss to the buyer pursuant to section 2-509(2)(b). *Id.* at 840.

[65]Note, *Commercial Transactions: Risk of Loss: What Does the Code Mean by Bailee?*, 21 OKLA. L. REV. 310, 313-15 (1968).

[66]For example, UCC § 2-509, Comment 3 states in part:

> The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.

The implication of this comment is that the drafters did not intend a seller to escape the obligation of bearing the risk of loss for goods remaining in his possession by interpreting section 2-509(2) to include the seller as a bailee.

### *D. Section 2-509(3)*

The residuary or catch-all provision[67] of section 2-509, subsection (3), enounces the general rule of risk of loss in the absence of breach and applies to situations not specifically covered by subsections (1) or (2). Subsection (3) provides:

> In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.[68]

Thus, if the seller is a merchant,[69] the general rule is that risk of loss passes to the buyer on his actual receipt of the goods. Receipts of goods, as defined by the Code, means taking physical possession.[70] On the other hand, when the seller is not a merchant, risk of loss passes to the buyer on the seller's tender of delivery.

The application of section 2-509(3) is aptly illustrated by the case of *Ellis v. Bell Aerospace Corp.*[71] Plaintiff Ellis contracted

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[67]In Hayward v. Postma, 31 Mich. App. 720, 188 N.W.2d 31 (1971), the Court of Appeals of Michigan, speaking of section 2-509(3), stated:

> The general approach of Article 2 of the code is that freedom of contract prevails; the greater part of it is concerned with detailing what happens where the contract is silent on a particular point. Such is the purpose of § 2-509(3). This provision was meant to cover the common situation where the parties have not agreed on who shall bear the risk of loss.

*Id.* at 723, 188 N.W.2d at 32. *See also* Diefenbach v. Gorney, 93 Ill. App. 2d 51, 234 N.E.2d 813 (1968).

[68]UCC § 2-509(3).

[69]Merchant is defined by section 2-104(1) as follows:

> "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

[70]UCC § 2-103(1)(c). When the seller had installed a television antenna and tower at buyer's home under a conditional sales contract, the court held these goods had been "received" so as to shift risk of loss to buyer pursuant to subsection (3) of section 2-509. The antenna and tower were held by the court to have been received inspite of the fact that seller agreed to maintain the system and could remove the system upon a payment deficiency. Lair Distrib. Co. v. Crump, 48 Ala. App. 72, 261 So. 2d 904 (1972).

[71]315 F. Supp. 221 (D. Ore. 1970).

to purchase a new helicopter from defendant Bell. The purchase price was paid when assembly of the helicopter was completed. Because there was a space shortage at Bell, the helicopter was stored at an airport. While Ellis was taking flight instructions from Bell employees at the airport, the aircraft crashed and burned. The district court applied section 2-509(3) with the view that Bell had never technically delivered to Ellis since Bell had not sufficiently relinquished dominion and control over the helicopter. The court stated that under section 2-509(3), "a merchant seller cannot transfer risk of loss to the buyer until the buyer actually receives the merchandise."[72] This rule applies "even though the buyer has paid the full price and has been notified that the goods are at his disposal."[73] The court, stating that an insurable interest is not synonymous with receipt of the goods, held for the buyer in spite of the fact that the buyer had obtained insurance on the aircraft.[74]

Subsection (3) usually applies to a situation in which the buyer is to pick up goods at the seller's place of business. Subsection (3) also applies when the seller is to deliver the goods other than by carrier, for example, when the seller ships via his own truck fleet.[75]

## III. Section 2-510—Effect of Breach on Risk of Loss

### *A. General Application*

Section 2-510 determines the effect of either party's breach of contract on allocation of risk of loss. Section 2-510[76] classifies

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[72]*Id.* at 224.

[73]*Id.*

[74]*Id.* In Mercanti v. Pearson, 160 Conn. 468, 280 A.2d 137 (1971), the defendant boat builder contracted to build a mast for the plaintiff buyer. The court stated that the application of section 2-509(3) would place the risk of loss on the defendant seller since the plaintiff had not received the goods and the defendant had not tendered delivery. *Id.* at 471-73, 280 A.2d at 140. However, since plaintiff had misled the defendant in the course of the transaction, the court, using the doctrine of estoppel, refused to apply section 2-509(3) and found for the defendant. *Id.* at 477-79, 280 A.2d at 142. *See also* Deitch v. Shamash, 56 Misc. 2d 875, 290 N.Y.S.2d 137 (N.Y.C. Civ. Ct. 1968), in which the court applied section 2-509(3) to a contract for the sale of real estate because the sale included a bronze sculpture.

[75]*See* R. Nordstrom, Handbook of the Law of Sales § 131, at 395 (1970); J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 5-1, at 139 (1972).

[76]*See* Portal Gallaries, Inc. v. Tomar Prods., Inc., 60 Misc. 2d 523, 302 N.Y.S.2d 871 (Sup. Ct. 1969).

the breached contract situation into three basic categories: (1) Subsection (1) applies to a breach by the seller which gives the buyer the right of rejection; (2) If the buyer accepts the goods, but later rightfully revokes his acceptance due to the seller's breach, subsection (2) allocates the risk of loss between the parties; (3) Subsection (3) determines who bears the risk of loss when the buyer repudiates or otherwise breaches before the risk of loss passes to him under section 2-509.

The general rule of section 2-510 is that the party who breaches the contract bears the risk of loss. In some cases, however, the breaching party bears the risk of loss only to the extent not covered by the nonbreaching party's insurance. This general rule has been severely criticized by the commentators[77] for sound reasons. The general policy behind the Code's approach to risk of loss is to place that risk on the party most likely to have insured or prepared against the loss. This general policy is applied by putting the risk on the party having possession or control over the goods. But, placing the risk on the breaching party is inconsistent with this general policy since there is usually no correlation between whether a party breaches a contract and whether he insures against risk of loss.

Furthermore, if the Code's drafters intended to simplify the area of commercial law which deals with risk of loss, they clearly failed to achieve that intent with section 2-510. As even a cursory reading of section 2-510 reveals, the section is dominated by complexities and is difficult to apply. As will be seen from the discussion which follows, subsection (3) contains a number of conditions which make it commercially impractical to apply. Indeed, the shortcomings of section 2-510 seem unnecessary in light of the simple and workable manner in which section 2-509 was drafted.

### *B. Seller's Breach*

#### *1. Buyer's Remedies for Breach*

Under the Code's "perfect tender rule,"[78] if the goods or the tender of delivery[79] fails *in any respect* to conform to the contract,

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[77]*See, e.g.*, R. NORDSTROM, supra note 75, § 136, at 416-17; J. WHITE & R. SUMMERS, *supra* note 75, § 5-5, at 146-47.

[78]UCC § 2-601. For a pre-Code case illustrating the application of the perfect tender rule, see Mitsubishi Goshi Kaisha v. J. Aron & Co., 16 F.2d 185 (2d Cir. 1926).

[79]Section 2-503 sets forth the requirements for the seller's tender of delivery. *See* note 24 *supra*.

the buyer may reject[80] the whole, accept the whole, or accept any commercial units and reject the rest. The perfect tender rule, which is codified in section 2-601, thus gives the buyer the right to reject any goods when those goods or the tender of delivery fails in any respect to conform to the contract. The installment contract provides an exception to the perfect tender rule.[81] Under an installment contract, the buyer may reject any nonconforming installment if the nonconformity substantially impairs the value of that installment,[82] and may reject the whole if the nonconformity substantially impairs the value of the whole.[83] In summary, the buyer under a contract may reject the goods if the goods or the tender fail to conform to the contract in any respect, while the buyer under an installment contract may reject the goods only if the nonconformity substantially impairs its value.

"Acceptance"[84] of goods precludes rejection of those goods.[85] However, even after the buyer has accepted the goods, he may "revoke acceptance," which has the same effect as rejection. Revocation of acceptance is permitted pursuant to section 2-608 if the nonconformity of the goods substantially impairs the value

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[80]Rejection of the goods must be within a reasonable time after delivery and is ineffective unless the buyer seasonably notifies the seller. UCC § 2-602.

[81]Section 2-601 specifically excepts installment contracts from the application of the perfect tender rule.

[82]UCC § 2-612(2). However, subsection (2) further provides that if the nonconformity does not substantially impair the value of the whole and the seller gives adequate assurance of cure, the buyer must accept that installment. *Id.*

When the seller has reasonable grounds to believe the nonconforming goods would be acceptable or when the time for performance has not yet expired, the seller has the right to cure the defect upon seasonable notification to the buyer. *Id.* § 2-508.

[83]*Id.* § 2-612(3). Subsection (3) further provides that the aggrieved party reinstates the contract if he accepts the nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect to past installments or demands performance as to future installments. *Id.*

[84]The buyer accepts the goods if he (1) notifies the seller that the goods are conforming or that he will retain them in spite of their nonconformity after the buyer has had a reasonable opportunity to inspect the goods, (2) fails to make an effective rejection pursuant to section 2-602(1) after a reasonable opportunity to inspect, or (3) does an act inconsistent with the seller's ownership. *Id.* § 2-606.

[85]*Id.* § 2-607(2).

of the contract to the buyer who has accepted the goods on the reasonable assumption that the nonconformity would be cured and it has not been seasonably cured, or if the buyer did not discover a nonconformity before acceptance and the nonconformity was difficult to discover.[86]

### 2. *Allocation of Risk of Loss*

Subsections (1) and (2) of section 2-510 apply to allocate the risk of loss when the seller breaches the contract of the parties. Subsection (1) provides:

> Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.[87]

The rule thus evolves that when the seller has breached the contract by a nonconformity[88] of tender or delivery of goods so as to give the buyer a right of rejection, the risk of loss remains on the seller until either the buyer accepts or the seller cures.[89] Simply stated, as long as the buyer has the right of rejection, the risk of loss remains on the seller because, according to subsection (1), the risk cannot pass until the buyer accepts or the seller cures. As previously explained, the buyer may reject goods under the perfect tender rule if the goods or the tender fail to conform to the contract *in any respect.* The exception is the buyer under

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[86] *Id.* § 2-608(1); *see* Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968). *Compare* Hays Merchandise, Inc. v. Dewey, 78 Wash. 2d 343, 474 P.2d 270 (1970), *with* Campbell v. Pollack, 101 R.I. 223, 221 A.2d 615 (1966). Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the nonconformity and before any substantial change in the condition of the goods, not due to the nonconformity, occurs. UCC § 2-608(2). Revocation of acceptance is not effective until the buyer notifies the seller. *Id.*

[87] UCC § 2-510(1).

[88]

> Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

*Id.* § 2-106(2).

[89]

> Under subsection (1) the seller by his individual action cannot shift the risk of loss to the buyer unless his action conforms with all the conditions resting on him under the contract.

*Id.* § 2-510, Comment 1.

an installment contract, who may reject only if the nonconformity substantially impairs the value of the contract.[90]

The application of section 2-510(1) is well illustrated by the case of *William F. Wilke, Inc. v. Cummins Diesel Engines, Inc.*[91] Having contracted to supply a diesel-powered generator, Wilke in turn contracted to purchase such a generator from Cummins. Cummins delivered the engine without batteries and maintenance and operating instructions. When Wilke attempted to start the generator, employees discovered that the engine had been severely damaged by the freezing of water in the cooling system. Wilke notified Cummins of the damages. The issue of whether the risk of loss had passed with delivery to the buyer, Wilke, arose when Cummins presented Wilke with a sizeable bill for repair of damages to the engine. The court correctly applied subsection (1) on the theory that Cummins had breached the contract by delivering an engine which could not be started and thus did not conform to the contract.[92] Applying subsection (1), the court concluded that the risk of loss remained on Cummins and that Wilke was not liable for the cost of repairing damages to the engine while Cummins retained the risk of loss.[93]

As previously explained, even after the buyer has accepted, he may revoke his acceptance under the conditions specified by section 2-608.[94] Subsection (2) of section 2-510 applies to the situation in which the seller has breached the contract, but the buyer has revoked his prior acceptance of the goods. Subsection (2) provides:

> Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.[95]

Thus, when the buyer responds to the seller's breach by revocation of acceptance, subsection (2) works to throw the risk of loss back

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[90]*See* text accompanying notes 78, 79, 80 *supra.*

[91]252 Md. 611, 250 A.2d 886 (1969). *See also* McKnight v. Bellamy, 248 Ark. 27, 449 S.W.2d 706 (1970); Portal Gallaries, Inc. v. Tomar Prods., Inc., 60 Misc. 2d 523, 302 N.Y.S.2d 871 (Sup. Ct. 1969).

[92]252 Md. at 617-18, 250 A.2d at 890.

[93]*Id.*

[94]*See* note 86 *supra* & accompanying text.

[95]UCC § 2-510(2).

on the seller to the extent the loss or damage is not covered by the buyer's insurance.[96]

Significantly, the buyer must "rightfully" revoke acceptance in order to throw the risk of loss back on the seller.[97] Since section 2-608 requires the buyer to make the revocation of acceptance before any substantial change in the condition of the goods occurs, the risk of loss would not shift back to the seller if the buyer attempted to revoke acceptance after the goods have been damaged or destroyed by a cause other than a defect in the goods. Note also that the burden of the risk of loss placed on the seller by subsection (2) is limited to any deficiency in the buyer's effective insurance coverage. The drafters point out that the "effective insurance coverage" language was used to protect the aggrieved party in the event of the supervening insolvency of his insurer.[98] The drafter's inserted the term "deficiency" in order to prevent subrogation.[99] Accordingly, subsection (2) shifts risk of loss back to the seller when damage to the goods occurs after acceptance and before a rightful revocation of acceptance, but only to the extent the damage is not covered by the buyer's insurance.

### *C. Buyer's Breach*

Subsection (3) of section 2-510 applies to allocate the risk of loss when the buyer breaches the contract of the parties. The construction of subsection (3) is similar to subsection (2) in that it shifts risk of loss only to the extent that damages exceed effective insurance coverage. Section 2-510(3) reads as follows:

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[96]The drafters stated their intent as to the operation of the subsection as follows:

> In cases where there has been a breach of the contract, if the one in control of the goods is the aggrieved party, whatever loss or damage may prove to be uncovered by his insurance falls upon the contract breaker under subsections (2) and (3) rather than upon him. . . .

UCC § 2-510, Comment 3.

[97]The buyer rightfully revokes acceptance by complying with section 2-608. As previously discussed, the buyer may revoke acceptance if the nonconformity of the goods substantially impairs the value of the contract to him and if he accepted the goods on the reasonable assumption that the nonconformity would be cured and it has not been cured, or if he had not discovered a nonconformity before acceptance and the nonconformity was difficult to discover. *Id.* § 2-608(1); *see* note 86 *supra* & accompanying text.

[98]UCC § 2-510, Comment 3.

[99]*Id.*

> Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.[100]

When the buyer repudiates[101] or otherwise breaches the contract, the risk of loss will shift to him by operation of subsection (3) if five conditions are present. First, the goods must "conform" to the contract. Goods conform to the contract when they are in accordance with the obligations under the contract.[102] Thus, if goods fail in any respect to conform to the contract, subsection (3) will not apply. Rather, subsection (1) will place the risk of loss on the seller to the full extent. That the goods must be "identified" to the contract constitutes the second condition imposed by subsection (3). In order to identify goods to the contract, the goods must be "shipped, marked or otherwise designated by the seller as goods to which the contract refers."[103] The third condition is that the goods must be "already" identified to the contract. The use of the word already requires that identification preceed the occurrence of the loss or damage to the goods. Fourthly, the breach or repudiation must occur prior to the risk of loss passing to the buyer. If the breach or repudiation occurs after the buyer has the risk of loss, the buyer bears the risk of loss to the full extent under section 2-509. Lastly, the loss must occur within a "commercially reasonable time." The agreement of the parties and all the facts and circumstances of the case would determine what constitutes a commercially reasonable time.

Again, assuming these conditions are present, subsection (3) shifts the risk of loss to the buyer only to the extent that the damage or loss exceeds the seller's effective insurance coverage. Subsection (3) is so burdened with conditions that it is difficult to understand and can seldom be applied. An attempted statement of the rule of subsection (3) readily reveals the difficulty of its application: if the buyer repudiates or otherwise breaches

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[100] *Id.* § 2-510(3).

[101] Although the Code does not specifically define repudiation, the use of the term in sections 2-610, 2-611, 2-703, and 2-711 indicates that repudiation means anticipatory breach.

[102] UCC § 2-106(2).

[103] *Id.* § 2-501(1)(b). *See also id.* § 2-704.

the contract before risk of loss passes to him under some other Code provision as to goods identified to the contract before the occurrence of damage to the goods, subsection (3) shifts the risk of loss to the buyer for a commercially reasonable time to the extent that the damage exceeds the seller's effective insurance coverage.

## IV. Conclusion

Under the Uniform Sales Act, allocation of risk of loss depended on the legal concept of passage of title. Recognizing the inadequacies of this concept, the drafters of the UCC developed rules based upon a more logical and workable principle. The general principle of the UCC's risk of loss provisions is to place the risk of loss on the party who is most likely to have insured or otherwise taken precautions against damage to the goods.

Section 2-509 sets forth the method of allocating the risk of loss when neither party breaches the contract. When the parties have contracted for the transportation of goods under a shipment contract, risk of loss passes to the buyer when the goods are duly delivered to the carrier. If a destination contract is involved, the risk of loss shifts when the goods are duly tendered so as to allow the buyer to take delivery. The basic rule covering the bailment situation is that the party having control over the bailee bears the burden of the risk of loss. When neither a transportation contract nor a bailment contract is involved, the general rule for the merchant-seller shifts the risk to the buyer when the buyer actually receives the goods. However, for the nonmerchant-seller, tender of delivery shifts the risk to the buyer. Significantly, the parties may avoid the application of section 2-509 altogether by contractually agreeing to their own method of risk of loss allocation.

Section 2-510 can be criticized for failing to adhere to the Code's general policy relating to risk of loss and for unnecessary complexity. The general rule of section 2-510 is that the risk of loss falls upon the breaching party. If the seller breaches by a nonconformity of tender or delivery of goods so as to give the buyer a right of rejection, the risk of loss remains on the seller until either the buyer accepts or the seller cures. If the buyer accepts nonconforming goods, but later rightfully revokes his acceptance, the burden of risk shifts back to the seller to the extent not covered by the buyer's insurance. On the other hand, if the buyer repudiates or otherwise breaches before the risk of loss passes to him, he suffers the risk to the extent not covered by the seller's insurance.

Overall, the Code's approach to the complicated commercial area of risk of loss marks a vast improvement over the prior law. The Code's rules are, for the most part, refreshingly simple. Furthermore the Code's approach to risk of loss is based upon sound, practical commercial policies. One provision, section 2-510, seems clearly deficient, partly because of its apparent inconsistency with the principle that the risk of loss should fall on the party most likely to have taken precautions against such loss. Hopefully, that provision will be amended to provide a more commercially sound approach.

STEPHEN L. WILLIAMS

# RECENT DEVELOPMENTS

**ADMINISTRATIVE LAW—FEDERAL AVIATION ACT—Civil Aeronautics Board ruling that Indiana-based air travel club has become a "common carrier" in violation of 49 U.S.C. § 1371(a) affirmed. —*Voyager 1000 v. CAB*, 489 F.2d 792 (7th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3626 (U.S. May 13, 1974) (No. 1033).**

The United States Court of Appeals for the Seventh Circuit has recently decided a case which threatens to destroy the air travel club[1] as a viable form of recreational transport. In *Voyager 1000 v. CAB*[2] the court of appeals upheld,[3] as supported by substantial evidence and a reasonable basis in law, a Civil Aeronautics Board determination that Voyager, an air travel club, was operating as an "air carrier" in "air transportation" without a certificate of public convenience and necessity as is required by law.[4] The ultimate issue was whether or not Voyager's activities constituted those of a common carrier[5] under the Federal Aviation Act of 1958.[6]

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[1]*Cf.* The Indianapolis Star, Jan. 5, 1974, at 22, col. 4. There are thirty air travel clubs throughout the United States. This case represents the first one in which the Civil Aeronautics Board (CAB) has brought an action against any of them for not having obtained a certificate of public convenience and necessity. Since this action was commenced, however, the CAB has filed three other enforcement proceedings. Petitioner's Brief for Certiorari at 7, Voyager 1000 v. CAB, 489 F.2d 792 (7th Cir. 1973).

[2]Voyager 1000 v. CAB, 489 F.2d 792 (7th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3626 (U.S. May 13, 1974) (No. 1033).

[3]*Id.* at 802.

[4]Voyager 1000, 2 AV. L. REP. ¶ 22,107 at 14,307 (C.A.B. 1973). The Federal Aviation Act of 1958, § 401(a) provides that:

> No *air carrier* shall engage in any air transportation unless there is in force a certificate [of public convenience and necessity] issued by the Board authorizing such air carrier to engage in such transportation.

49 U.S.C. § 1371(a) (1970) (emphasis added).

[5]The Federal Aviation Act ultimately demands that an unlicensed air carrier be operating as a "common carrier" before it can be deemed in violation of section 401(a). An air carrier is defined as "any citizen in the United States who undertakes, whether directly or indirectly or by a lease

Voyager was organized in September, 1964, as a private air travel club under the Indiana Not-For-Profit Corporation Act.[7] Although the basic purpose of the club, which was to provide recreational travel for its membership, did not change over time, both Voyager's size and activity greatly increased.[8] When originally formed, Voyager had planned to limit its membership to 1000 dues paying individuals. Dues were set at four dollars per month with a $125 individual initiation fee or a $200 family initiation charge. By 1965, the club had achieved its membership goal and a new corporation, Voyager 2000, was founded. Eventually, the two travel clubs merged and Voyager 1000 retained a stable membership of 2,400 persons for the next two years. Early in 1968, however, the travel club entered a period of severe financial difficulty.[9] During this time it became apparent that a substantially larger dues paying foundation was needed if Voyager 1000 were to survive. A vigorous new membership drive was embarked upon. Initiation fees were lowered and in at least one case waived.[10] Advertisements for membership were widely published or broadcast and open houses were held.[11] Initially a goal was set of 5,000 members. This was increased in 1970 to 20,000. Additionally, in September, 1968, Voyager qualified for a certificate of operation under the newly adopted part 123 of the Federal Aviation Regulations. The rule was promulgated by the Federal

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or any other arrangement, to engage in *air transportation*. . . ." 49 U.S.C. § 1301(3) (1970) (emphasis added). Air transportation is defined under the same section as "interstate, overseas, or foreign air transportation . . . ." *Id.* § 1371(10). These terms are defined respectively as meaning "the carriage by aircraft of persons or property as a *common carrier* for compensation or hire . . . in commerce . . ." between the United States and another country, between the states, or between its states and territories or possessions. *Id.* at § 1371(21) (emphasis added).

[6]The Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* (1970) [hereinafter cited as 1958 Act].

[7]IND. CODE §§ 23-7-1 to -6 (1971).

[8]Petitioner's Brief for Certiorari at 31, 47, *quoting from* the initial decision of Administrative Law Judge William J. Madden.

[9]*See id.* at 30-32.

[10]489 F.2d at 795. Note also that dues were raised. *Id.*

[11]*Id.* For examples of Voyager's advertising through the public media, see Brief for Petitioner, Appendix at 121-28.

Aviation Administration (FAA)[12] to set safety standards for air travel clubs[13] using large aircraft.

On November 16, 1971, when the CAB's Bureau of Enforcement filed its complaint against Voyager 1000, the club's outstanding memberships numbered approximately 14,500. This represented an estimated 43,000 individuals eligible for the club's flights due to family memberships.[14] Voyager employed over eighty persons, owned five aircraft, and operated two others.[15] The number of flights operated and passengers carried during any one period varied.[16]

The Bureau's petition for enforcement alleged that Voyager was operating as a common carrier for compensation or hire without authority from the Board in violation of section 401(a) of the Federal Aviation Act.[17] The major assertions of the complaint were that Voyager: 1) solicited the general public through its advertising, 2) had no membership criteria, although it did require "nominal" payment of fees and dues, and 3) possessed a membership that was not in fact private but constituted a segment

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[12]Under the 1958 Act both the economic and safety regulation of commercial aircraft are provided for. In order to comply with the law, an air carrier must obtain the appropriate safety clearance from the Federal Aviation Agency, 49 U.S.C. §§ 1421-31 (1970), and economic authority from the Civil Aeronautics Board, *id.* §§ 1371-87.

Part 123, 14 C.F.R. §§ 123.1-.53 (1973), was adopted by the FAA in 1968 in order to assure that the safety levels demanded of commercial operators, *id.* § 121 *et seq.*, were also met, with minor operational modifications, by air travel clubs. Should it later be discovered that a person is operating as an *air carrier*, then such person is required to obtain a certificate of operation from the CAB as well as a new certificate of operation, issued under part 121, from the FAA. Brief for Petitioner, Appendix at 99, *quoting from* the memorandum of the Department of Transportation as Amicus Curiae.

[13]Under part 123 an air travel club is defined as "a person who engages in the carriage by airplanes of persons who are required to qualify for that carriage by payment of an assessment, dues, membership fee, or other similar type of remittance." 14 C.F.R. § 123.1(b) (1973).

[14]489 F.2d at 795.

[15]*Id.* As of November 11, 1973, Voyager had reduced its staff to fifty-four persons and was operating two aircraft. Paid memberships numbered approximately 13,000. Indianapolis Star, Nov. 18, 1973, § 3, at 5, col. 2.

[16]*See* 489 F.2d at 795 n.5, 796.

[17]*Id.* at 796.

of the public.[18] On June 22, 1972, an Administrative Law Judge, after evidentiary hearings, dismissed the complaint.[19] The Bureau of Enforcement petitioned for review to the Board and the prior ruling was reversed.[20] Voyager initiated the instant appeal.

Although the term "common carrier" is not defined by the Federal Aviation Act, the CAB has sought to clarify its meaning in a number of cases and in a variety of contexts. However, the decisions have been less than harmonious,[21] and "these precedents leave a considerable area of choice which the Board necessarily exercises in applying the broad definition of the statute to particular carriers . . . ."[22] Consequently, the underlying issues in the *Voyager* appeal were whether, in light of prior case law, the Board's determination that Voyager 1000 operated as a common

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[18]Brief for Petitioner, Appendix at 4, *quoting from* the Bureau of Enforcement Complaint.

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> On the basis of the foregoing findings and conclusions and all the facts of the record, it is found that Voyager 1000 at the outset was intended to be a private club providing transportation for its members in a capacity of a private carrier; it has operated in this concept and, despite expansion of the membership from that originally planned, it has not moved into the status of common carrier.

Petitioner's Brief for Certiorari at 47, *quoting from* the initial decision of Administrative Law Judge William J. Madden.

[20]

> In sum, viewing its activities objectively, we find that Voyager widely promoted and provided air transportation to the general public in return for payment of money. Despite the various labels Voyager attaches to itself and to various aspects of its method of operation, it is "furnishing transportation by air to the general public on a commercial basis." (*Las Vegas Hacienda v. C.A.B., supra*, 298 F.2d at 436) . . . .

2 AV. L. REP. ¶ 22,107, at 14,307.

[21]

> Generally speaking, a common carrier is defined as one who holds himself out as ready and willing to undertake for hire the transportation of passengers or property from place to place, and so invites the patronage of the public.

Transocean Air Lines, 11 C.A.B. 350, 352 (1950). *Compare id.* at 353 (when service is limited to a particular few who contract with the carrier, this may require a conclusion that such carrier is a private carrier for hire), *with* 298 F.2d at 434 (it is immaterial that services offered attract only a limited group and are performed pursuant to contract).

[22]Las Vegas Hacienda, Inc. v. CAB, 298 F.2d 430, 433 (9th Cir. 1962).

carrier was supported by substantial evidence[23] and prospectively, whether the CAB's decision to exercise its powers fulfilled the underlying policies of the 1958 Act.[24]

No federal court, prior to the Seventh Circuit Court of Appeals in the instant case, had ever been presented with the problem of distinguishing what type of operation constituted a common carrier as opposed to an air travel club. The Bureau of Enforcement refused to take a position on the criteria to be used,[25] and policy pronouncements which were made in conjunction with the adoption of part 123 proved to be of limited value.[26] An FAA

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[23]49 U.S.C. § 1486(e) (1970) provides that "[t]he findings of facts [sic] by the Board or Administrator, if supported by substantial evidence, shall be conclusive." In Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966), the Supreme Court reaffirmed its definition of the substantial evidence standard as meaning that which a reasonable mind might accept as adequate to support a conclusion. It was noted that Congress adopted the standard out of a desire to free reviewing courts from the time consuming task of re-weighing evidence and to give proper credit to administrative expertise. *Id.* For a more complete discussion of the substantial evidence standard as it relates to judicial review of administrative decisions, see K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 29 (1958, Supp. 1970).

[24]Since the reviewing court could not substitute its interpretation of policy for that of the CAB, the majority limited itself in this respect to a consideration of policies under the 1958 Act only as they might relate to a common carrier definition. That the court was not unaware of broader policy issues, however, is indicated by its comment in footnote thirteen, *see* note 43 *infra*, of its decision and Circuit Judge Pell's concurring opinion.

[25]2 AV. L. REP. ¶ 22,107, at 14,307. Delineation of the boundary between air travel clubs and common carriers is of more than casual interest to operations such as Voyager whose assets were claimed to be in the neighborhood of $2,000,000. By definition, air travel clubs border on the status of common carriers. The CAB "probably" participated in the air travel club definition's drafting, 489 F.2d at 797. In view of such a fact situation, Voyager's pleas for leniency and legal clarification deserved more consideration than the cavalier statements of the Board suggest they received. *See* 2 AV. L. REP. ¶ 22,107, at 14,307-08. The CAB may be asking the remaining clubs to take a risk that is unreasonable. *See* Aeronauts Int'l Travel Club, Inc., No. 25,517 (Admin. L. Ct., Jan. 3, 1974):

> It *may be* that there *can* be such a thing as a bona fide air-travel club under FAR 123, but those examined in formal proceedings before the Board so far fail such status.

*Id.* at 40 (emphasis added).

[26]Little weight was accorded 33 Fed. Reg. 12,887 (1968), which identifies the primary characteristics of an air travel club as its nonprofit organization, sporadic flight scheduling, and relatively small number of hours spent in flight time.

opinion to the effect that Voyager was not a commercial carrier engaged in common carriage[27] was summarily dismissed by the court as not logical.[28] Consequently, the court was compelled to consider the problem in light of the purposes underlying CAB regulation and prior case law which was analogous to, but not identical with, the fact situation represented in *Voyager*.

Under the Federal Aviation Act, the CAB is charged with the responsibility of providing the public with "economical and efficient service at reasonable charges, and [avoiding] destructive competitive practices."[29] Thus, the court reasoned that an attempt by the CAB to define common carriage necessarily involves the delineation of the regulated (individually ticketed) from the non-regulated (group) market.[30] By having formulated the issue in this manner, the court of appeals has, in effect, said that a person becomes a common carrier, subject to regulation, when he *competes* with the commercial air carriers in furnishing transportation by air to the individually ticketed *public*.[31]

In order to determine whether Voyager had been fairly classified as a common carrier, the court of appeals turned its consideration to the recent case *Saturn Airways, Inc. v. CAB*.[32] The issue in *Saturn Airways* was not one of common carrier status, but dealt with the distinction between individually ticketed and group fare markets. It was noted by the *Voyager* court, however, that the market to be served under the proposed travel group

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[27]Brief for Petitioner, Appendix at 75, *quoting from* a letter from the Federal Aviation Administration to Voyager 1000, Aug. 2, 1971. *See also* Club Int'l, Inc., No. 24,387, at 14 n.9 (Admin. L. Ct., June 6, 1973) (FAA letter to Argosy Air Travel Club, dated March 15, 1971, advising the club on the permissibility of its membership solicitations).

[28]489 F.2d at 797. The FAA had concluded that nonprofit air travel clubs were not common carriers since they could not fly passengers for hire, but only members for pleasure. It was stated by the court that this was clearly insufficient reasoning since air travel clubs provide transportation for a price which omits the profit factor. Therefore, they would represent the strongest type of competition to commercial airlines.

[29]49 U.S.C. § 1302(c) (1970).

[30]489 F.2d at 798.

[31]This analysis ignores the fact that a regulated market does not always provide the most economical and efficient service to the public. It also assumes that even limited free market competition within the air transportation industry is to be discouraged. That any segment of society is denied access to air travel, which might not otherwise be available to it as a result, is regrettable. *See id.* at 802 (Pell, J., concurring).

[32]483 F.2d 1284 (D.C. Cir. 1973).

charter (the group market) as it was authorized by the CAB and the market served by Voyager bore a heavy resemblance to one another.[33]

The major question in *Saturn Airways* was whether the CAB could legitimately authorize the Travel Group Charter for supplemental air carriers[34] without an evidentiary hearing as to its diversionary effects on the regularly scheduled airline passenger market. It was held that the CAB had acted permissibly for two reasons. Although the Travel Group Charter did away with the old "nontravel affinity between charter members"[35] requirement inherent in earlier regulations, other equally effective restrictions were imposed to protect the individually ticketed market.[36] Secondly, the travel group charter regulations were experimental and due to be terminated in 1975 pending investigation of their effect.[37]

In *Voyager*, particular signifigance was assigned to the limitations placed upon the travel group charter by the CAB. The court noted that such limitations served to eliminate from the charter market those members of the traveling public "who require transportation on short notice without risk of cancellation or restrictions on return accomodations."[38] The Board's determination below, it was said, focused upon those characteristics of Voyager 1000 which failed to eliminate from its service members of the individually ticketed market.[39] Factually, the court's statement gives the Board's analysis more than its due. It implies a weighing of the equities between safe air travel at a moderate price and the modicum of economic competition that the air travel clubs might offer commercial carriers. This did not take place.

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[33]489 F.2d at 798.

[34]49 U.S.C. §§ 1301(33), 1971(d)(3) (1970) authorize the Board to certify supplemental air carriers for charter business as the term is defined by it. Section 1301(32) defines a supplemental air carrier as an air carrier engaging in supplemental air transportation, *i.e.*, charter trips.

[35]This term is the Board's shorthand way of referring to a social relationship which arose between travel participants prior and unrelated to their application for a charter flight.

[36]483 F.2d at 1292. For a discussion of the more important restrictions imposed, see page 747 *infra*.

[37]483 F.2d at 1293.

[38]489 F.2d at 299.

[39]*Id.*

The approach taken by the Board in review of the original administrative decision for Voyager is the same that it has followed in all cases turning on the common carrier issue since 1950. This approach centers on whether the alleged common carrier has "engaged as a regular business in offering air transportation to the general public in the commercial market."[40] It is doubtful whether any carrier for compensation could pass the test once applied. The Board has held that it is immaterial that the service offered is performed pursuant to special contract and may be attractive to only a limited group.[41] So long as the service is patronized by the *public*, it is a common carrier. The public market, of course, can be as broad or as narrow as the CAB chooses to make it.[42]

In its review of the Board's decision, the Seventh Circuit Court of Appeals also failed to deal with the equitable balance between an offering of economical and efficient air service to qualified members of the public and the competitive harm which would result to regularly scheduled point-to-point air carriers. Doubtlessly, the court was aware of such a weighing test as applied by the District of Columbia Circuit in *Saturn Airways*.[43] Following

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[40]Las Vegas Hacienda, Inc. v. CAB, 298 F.2d 430, 434 (9th Cir.), *cert. denied*, 369 U.S. 885 (1962) (resort hotel operator selling package tours from Los Angeles to Las Vegas, including "free" air transportation). *See* Consolidated Flower Shipments, Inc., 16 C.A.B. 804, 814-15 (1953), *aff'd*, 213 F.2d 814 (9th Cir. 1954) (flower shipping cooperative formed for purpose of consolidating shipments was engaged indirectly in air transportation); Transocean Air Lines, Inc., 11 C.A.B. 350, 352 (1950) (transportation of passengers on international flights upon a regular basis and without restriction constitutes common carriage).

[41]298 F.2d at 434.

[42]*Compare* 483 F.2d at 1292 (in which the *Saturn Airways* court sets forth the five differences between conventional and travel group charter travel which the Board claimed were "substantial and vital"), *with* Brief for Petitioner, Appendix at 4, *quoting from* the Bureau of Enforcement Complaint (in which it is claimed that Voyager's operations, which served substantially the same market, held out transportation to the *public*).

[43]Referring to the *Saturn Airways* decision, it said:

> The court's analysis quite properly demonstrated the limitations on the Board's statutory duties. *The desired result is not to remove all operations which compete with commercial airlines* but rather to regulate *only* those operations which affect the *economic soundness* of regularly scheduled point-to-point air transportation.

489 F.2d at 799 n.13 (emphasis added).

the path of least resistance, however, the lopsided CAB approach was taken. Voyager's activities as they related to a "holding out to the public or a segment of the public"[44] of a transportation service indiscriminately available, were investigated. In particular its membership qualifications were scrutinized.

Petitioner, in reply to the Bureau of Enforcement's charges, contended that: 1) its uniqueness and capacity to provide convenient service at a moderate price set it apart from commercial carriers, 2) its advertising was permissible since such solicitation was not aimed at obtaining business from the public, but new memberships, 3) there was no evidence that the advertising diverted persons from the individually ticketed market, 4) Voyager members acquired a social affinity separate from the general public, and 5) as a practical matter the club's members failed to receive individually ticketed service.[45] The court did not accept these arguments.

Claims of distinctive service were said to relate only to whether a certificate of exemption should issue under section 416 of the Federal Aviation Act and not to the determination of common carrier status. This analysis of petitioner's argument would appear to be correct when viewed in light of the appropriate statutory language.[46] However, it assumes that competition of the type contemplated by the Act is already taking place. This is the crucial point in the *Voyager* decision. Was the CAB's ruling supported by substantial evidence that the club was holding itself out as a carrier for hire in the individually ticketed market?

The *Voyager* court perceived the proper inquiry as whether the club's advertisements solicited prospective members where membership was undifferentiated from the traveling public at large.[47] Consequently, the court reasoned that even if Voyager's advertisements solicited only new members and were not meant to attract public patronage generally,[48] this fact was irrelevant.

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[44]*Id.* at 799.

[45]*Id.* at 800.

[46]49 U.S.C. § 1386(b)(1) (1970) allows the CAB to exempt an air carrier or air carriers from terms, conditions, or regulations under the 1958 Act if they constitute an undue burden upon the carrier and are not in the public interest.

[47]489 F.2d at 801.

[48]Most, if not all, of the club's advertisements which appeared in the public media were addressed "to Voyager members only." However, the court's analysis puts the inquiry of how widely club memberships were solicited and

Alternatively, the court focused on the two factors that the Administrative Law Judge had concluded *did* separate club members from the public generally. These were the substantial fees paid by members and the declared affinity between travel minded persons. It was first decided in *Voyager* that to use travel-mindedness as the basis for travel club affinity begs the question[49] and secondly that membership fees paid by individuals cannot provide a real basis for distinction from the public where these fees are insignifigant in terms of the fare bargains made available through their payment.[50] The court of appeals also found that the record was devoid of criteria sufficient to differentiate individually ticketed service from that offered by the club.[51] Thus, the Board's opinion was affirmed.

*Voyager* represents more than another case involving the definition of the term common carrier. It involves a search into basic policy considerations behind the Federal Aviation Act of 1958, as well as an inquiry into the proper functions of the Board and administrative agencies generally. Section 102(a) of the Act states that one of the basic duties of the Board is to encourage the development of "an air-transportation system properly adapted to the present and future needs of foreign and domestic commerce . . . ."[52] Fulfillment of this duty contemplates nonregulation

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from whom, after the basic question of whether a club's membership is sufficiently separated from the "public" that carriage of its members constitutes private transportation. How differentiated a group would have to be so as not to be adjudicated a part of the public is not clear. The court's decision would seem to suggest that a club's dues and initiation fees must be high enough to eliminate fare bargains in the flight transportation packages offered to its members.

[49]489 F.2d at 801. Why the affinity arising out of Voyager members' specialized air transportation arrangements was not sufficient does not appear.

[50]This language is taken directly from the Board's decision, Petitioner's Brief for Certiorari at 71 & n.12, *quoting from* Civil Aeronautics Board Enforcement Proceeding. The statement that the financial outlay for members was insignificant when viewed in light of the fare bargains available is based on an unfair comparison of commercial verses Voyager's rates. Voyager's total rates and fees for a tour to Zurich were compared with commercial rates for the same trip during the peak travel season. The fact that only twelve percent of the passengers traveling to Europe on American carriers used this peak travel fare in 1972 was ignored. Alternatively, most travelers obtained charter or group rates which were lower than the costs to Voyager members. Reply Brief for Petitioner at 18.

[51]489 F.2d at 802.

[52]49 U.S.C. § 1302(a) (1970).

as well as regulation by the CAB in some areas. This fact has been implicitly recognized by the Board through the adoption of its travel group charter regulations.[53]

In *Saturn Airways*, opposition to the travel group charter concept was registered by scheduled carriers who objected to the absence of any nontravel affinity restrictions. However, the Board correctly replied that nontravel affinity is not necessarily a prerequisite for charter legality under the Act. It merely serves as a useful basis for separation of the group and individually ticketed markets. It was recognized that totally unrelated persons could group together solely for travel purposes and "nonetheless have a true affinity arising solely from the special terms and conditions governing their transportation arrangements."[54]

The special terms and conditions which were found sufficient to separate the individually and group ticketed markets in *Saturn Airways* are signfigantly like those under which Voyager members were, as a practical matter, flying prior to issuance of the Bureau's cease and desist order. Under the CAB's regulations, travel group charter organizers must meet five major requirements prior to their exemption from section 401 of the Federal Aviation Act. The prior conditions are that: 1) travelers under the charter are to be assessed a pro rata share of the air transportation costs, 2) all charter participants must pay a nonrefundable twenty-five percent deposit of these costs, 3) full payment is due from each person sixty days or more prior to flight departure, 4) the charter must be on a round trip basis, and 5) the charter must be arranged by a person acting solely as an agent for the charterers and not otherwise connected with the carrier. Although Voyager's charges were not pro rated for specific flights, they did reflect the per member costs of previous like trips.[55] Rates per passenger mile were adjusted as the occasion arose. This cost projection method of charging travel participants is exactly what may be anticipated for use under the travel group charter system. The advantages of group travel and unscheduled air transportation arise out of the lower rates

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[53]Charter organizers who fulfill the travel group charter requirements are exempted from section 401 and various other provisions of the 1958 Act under 14 C.F.R. § 372a.20 (1973).

[54]37 Fed. Reg. 20,808 (1972).

[55]Petitioner's Brief for Certiorari at 36-37, *quoting from* the initial decision of Administrative Law Judge William J. Madden.

which may be charged upon full utilization of aircraft.[56] Therefore, similar fully-loaded charter flights will predictably lead to more or less standard and quotable pro rata prices. Charter organizers will assuredly exploit this fact. This is no more than Voyager did.

Travel group charter limitations on charter fee payments and nonrefundability are similarly indistinguishable from Voyager's practices. Despite the fact that travel group charter fees are nonrefundable, a participant's interests are "assignable" under the CAB regulations.[57] The price of the interest assigned is to be no more than was paid by the charter participant. Voyager would refund fees paid by members until thirty days prior to flight departure. In practical effect, this was less than what the charter regulations allow.[58] It is one of the factors extolled by both the *Saturn Airways* and *Voyager* courts as useful in distinguishing between the individually ticketed and group fare markets.[59] If risk of loss from short notice cancellation of flight reservations is one of the relevant factors in the public-private distinction, then Voyager members could have been deemed less a part of the public than the participants in a travel group charter. The club's membership paid substantial[60] dues which were continuous despite flight cancellations, unavailability of trips at desired times and of desired length, or nonuse of club facilities.[61]

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[56]*See generally* 483 F.2d at 1287 & n.6.

[57]14 C.F.R. § 372a.13 (1973).

[58]An assignment of a charter participant's interests is made through the group organizer for cash. Voyager practice was apparently only to give flight scrip if cancellation was made within the thirty day period.

[59]Saturn Airways, Inc. v. CAB, 483 F.2d 1284, 1292 (D.C. Cir. 1973); Voyager 1000 v. CAB, 489 F.2d 792, 799 (7th Cir. 1973).

[60]Voyager's members paid higher fees than any other air travel club with one exception. Their dues were also higher than many of the social clubs whose members are eligible for group fares. Brief for Petitioner at 18.

[61]A Voyager survey of 200 of its members showed that "only one arranged for transportation at the time of joining—on the average new members took their first flight 5½ months after joining . . . ." Reply Brief for Petitioner at 17-18. A survey taken by the CAB of the membership in another club showed, out of 410 members surveyed, and 260 responses received, the following results, with regard to trips taken: no trips, 200, one trip, 47, two trips, 9, and three trips, 1. When asked whether a reservation was made at the time of joining, the answers were: 200 no and 42 yes. Club Int'l, Inc., No. 24,387, at 19 (Admin. L. Ct., June 6, 1973). *See also* note 50 *supra*.

Round trip transportation is required under the CAB regulations. Voyager's arrangements for club members implicitly embodied the same requirement.[62] Members normally could not determine the length of their visit individually, nor in some cases could they separate air and ground charges.[63]

Finally, the rules governing the travel group charter require an independent travel organizer who is unassociated with the carrier. In this respect, air travel club practices are not similar to the travel group charter requirements. Nevertheless, the intended purpose of the restriction, which is to discourage the marketing of individual tickets to the general public,[64] is fulfilled by the nonprofit travel club. There is no incentive for these associations to compete with the scheduled carriers for business.[65] Similarly, there is no reason to permit a larger membership than is necessary to keep the club on a stable financial footing.[66]

In sum, analysis will support the statement that the CAB has taken a contradictory stance concerning Travel Group Charters and air travel clubs. Perceptibly, it has taken this inconsistant position due to the possibility for abuse by these clubs of their exempt noncommon carrier status under part 123.[67] Yet, to gain

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[62]Not all air travel clubs require this, however. *See* Club Int'l, Inc., No. 24,387, at 26 (Admin. L. Ct., June 6, 1973).

[63]Brief for Petitioner, Appendix at 171, 178.

[64]483 F.2d at 1294.

[65]These statements assume a true nonprofit standing on the part of the air travel club concerned. Voyager 1000 apparently was in such a position prior to and during the time of its appeal. It did, however, have plans to lease property from interested parties at one time. *See* Indianapolis Star, Mar. 9, 1972, at 20, col. 1. Both Aeronauts International and Club International were substantially linked with for-profit ventures. *See* Club Int'l, Inc., No. 24,387, at 10-11 (Admin. L. Ct., June 6, 1973) (air travel club used travel agency operated by party that formed it); Aeronauts Int'l Travel Club, Inc., No. 25,517, at 41 (Admin. L. Ct., Jan. 3, 1974) (club aircraft leased from for-profit venture owned by club management).

[66]Voyager's history shows a record of expansion only at times when increased membership was necessary to keep it on a firm financial footing. *See* Petitioner's Brief for Certiorari at 30-31, *quoting from* the initial decision of Administrative Law Judge William J. Madden.

[67]This fear is not completely unjustified as the *Aeronauts International* and *Club International* enforcement proceedings show.

Both clubs were nonprofit in name only. The inference was clear in many of the Club International advertisements that one-way or roundtrip ticketing was available without limitation as to the duration of one's stay at

the power of regulation over them, the Board must find that they are common carriers as supported by substantial evidence. Arguably, it failed to do so[68] in Voyager's case. Since the substantial evidence standard has been interpreted so broadly by the courts, however, the likelihood of an administrative decision being overturned solely on this point is minimal.[69] However, if it is asked who is responsible for the possibility of abuse of the air travel clubs under part 123, the answer is clear. To be sure, the CAB did not make Voyager 1000 violate the law. What it may have done was to affirmatively mislead the club into acting in such a manner. This would constitute ground for the issuance of an administrative estoppel.[70] That the CAB took a part in the actual drafting of part

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the point of destination. Club Int'l, Inc., No. 24,387, at 26 (Admin. L. Ct., June 6, 1973). Aeronaut International's "activity schedules" in some cases urged remittance of club membership fees along with tour fees upon joining. The same schedules show frequent flights to and from the same destinations. Aeronauts Int'l Travel Club, Inc., No. 25,517, Appendices G at 2 & H at 1 (Admin. L. Ct., Jan. 3, 1974).

[68]As the appellate decision indicates, an increase in the membership of an air travel club alone does not make it a common carrier. The key question is whether its members are defined in a manner so as to be undifferentiated from the public at large. 489 F.2d at 801. The Bureau of Enforcement made three arguments in this respect: 1) that Voyager members ceased membership after one flight, 2) that "numerous" applicants paid initiation flight and fees at the same time, and 3) that Voyager's fees were only "nominal." Brief for Petitioner, Appendix at 4, *quoting from* the Bureau of Enforcement Complaint.

Referring to the first point made, the Administrative Law Judge said "there is no factual basis to sustain this allegation." Petitioner's Brief for Certiorari at 46, *quoting from* the initial decision of Administrative Law Judge William J. Madden. His statement was never refuted. Point two of the complaint was rebutted by Voyager's survey. *See* note 61 *supra*. Again, the Bureau failed to come forward with evidence. Finally, the Bureau of Enforcement's third contention was apparently only supported by the Board's observation which is of doubtful value. *See* note 50 *supra*.

[69]This is not meant to imply that the standard is a poor one, but only that it may lead to unnecessary judicial deference to administrative determinations in borderline cases.

[70]United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 674-75 (1973) (Army Corps of Engineer's consistent limitation of its regulation to certain types of pollutant discharge might have deprived defendant of fair warning that its actions would be considered illegal). *Cf.* Cox v. Louisiana, 379 U.S. 559 (1965) (defendant who was advised that planned demonstration at certain location was not "near" the courthouse could not later be convicted for same); Raley v. Ohio, 360 U.S. 423 (1959) (appellants who relied on privilege as represented to them by investigating committee could not later be convicted for wrongful exercise).

123 in cooperation with the FAA is not clear from the record.[71] Nevertheless, the Board's inaction under the circumstances[72] should have been sufficient to cause a modification of the Board's order, which was not aimed at forcing Voyager to comply with the law per se, but at the club's destruction.[73]

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The reader should note that *Pennsylvania Chemical* is apparently the first case to hold that a government agency may be estopped by its own inaction and the implied representations arising therefrom. *Voyager* might be distinguishable on the grounds that a criminal sanction was not applied. Alternatively, the amount of capital involved should have convinced the Supreme Court that the instant case was one of moment. For an exhaustive analysis of the relatively new doctrine of administrative estoppel, see K. DAVIS, ADMINISTRATIVE LAW TEXT § 17.01 *et seq.* (1972); Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374 (1953); Note, *Applying Estoppel Principles in Criminal Cases*, 78 YALE L.J. 1046 (1969).

[71]Why this point was not pursued further, under the Freedom of Information Act, 5 U.S.C. § 552 (1970), does not appear. Perhaps the material to be sought was exempted from discovery under section 552(b)(5) relating to interagency memoranda not available to a party other than an agency in litigation with an agency.

[72]Fairness demands that the Board not be held accountable for not having foreseen every possibility for abuse or accidental infringement under the 1958 Act. *See generally* Las Vegas Hacienda v. CAB, 298 F.2d 430 (9th Cir. 1962). However, Voyager's setting is quite distinguishable. Some air travel clubs, of which Voyager was one, have been in operation at least seven years. Travel club growth has been in the administrative eye since 1967. *See* 32 Fed. Reg. 10,311 (1967) (FAA). It cannot be seriously contended that the Board did not contemplate an eventual trespass (be it purposeful or accidental) into the regulated market by their activities.

How the CAB should have acted to make its views known prior to taking court action is itself a matter of some dispute. One avenue that has been suggested is section 416(a) of the 1958 Act, 49 U.S.C. § 1386(a) (1970). This would probably have been insufficient since the provision applies only to "air carriers," *i.e.*, common carriers by definition. The air travel clubs are not wholly without fault. The record is barren of any requests for guidelines from the CAB directly. Nevertheless, it is not unusual for an organization to look solely towards the agency under whose auspices it operates for guidance. Either there was a culpable breakdown in communication between the FAA and CAB, or the Board acted inequitably in refusing at least informal comment. That it could have clarified the situation if it desired is exemplified by its commendable work with the travel group charter regulations. The after-the-fact commentary of its own Administrative Law Judges indicates the same. Aeronauts Int'l Travel Club, Inc., No. 25,517, at 40 n.75 (Admin. L. Ct., Jan. 3, 1974).

[73]2 AV. L. REP. ¶ 22,107, at 14,307: "Voyager must cease holding out air transportation even to its so-called members."

**CIVIL RIGHTS**—CIVIL RIGHTS ACT OF 1964—A bar containing various mechanical means of amusement held to be a "place of entertainment" and therefore a public accommodation within the meaning of the Act.—*United States v. Deetjen*, 356 F. Supp. 688 (S.D. Fla. 1973).

Ben and Mary Deetjen refused to provide service to Negroes in the cocktail lounge of the St. Lucie Inn. Such refusals had been regular occurrences and were based upon the defendants' policy to exclude Negroes from that portion of the Inn.[1] As if to emphasize their discrimination, defendants frequently directed Negroes to the drive-in package store portion of the establishment after service in the lounge had been refused.[2]

The United States[3] sought to enjoin the blatant discrimination pursuant to the Civil Rights Act of 1964.[4] The district court,[5] in *United States v. Deetjen*,[6] held that because the piano, juke box, and television set provided for the use of customers inside the St. Lucie Inn were manufactured outside Florida, operation of the bar "affected commerce" within the meaning of the statute. The court further held, on the plaintiff's motion for amendment of the judgment, that the bar was a "place of entertainment" within the meaning of the public accommodations section of the Civil Rights Act. The alleged racial discrimination could therefore be enjoined pursuant to the Act.[7] The district court relied exclusively upon

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[1]United States v. Deetjen, 356 F. Supp. 689 (S.D. Fla. 1973).

[2]*Id.* On occasion, employees had offered to serve a Negro a mixed drink in a paper cup through the drive-in window of the package store. Any service to Negroes inside the lounge had been isolated incidents and were in exception to defendant's normal policy and practice. *See* Brief for United States at 7-9. *See also* note 40 *infra*.

[3]The United States has standing to bring suit. *See* 42 U.S.C. § 2000a (5) (1970).

[4]*Id.* § 2000 *et. seq.*

[5]Section 2000a(6)(a) provides that,

> The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subchapter and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

[6]356 F. Supp. 689 (S.D. Fla. 1973).

[7]*Id.* at 691.

the Fifth Circuit's decision in *United States v. DeRosier*[8] for amendment of its judgment.

Establishments covered by the provisions of the public accommodations section of the Civil Rights Act of 1964 are grouped into four general categories: (1) establishments used for lodging, (2) establishments used for eating, (3) establishments used for entertainment, and (4) establishments located on the premises of other covered establishments or which have covered establishments on their premises.[9] Certain kinds of establishments are specified within each of the first three categories. Inns, hotels, motels, restaurants, cafeterias, lunch counters, theaters, and arenas are specifically enumerated by the Act. The significance of *Deetjen* is that an establishment with the characteristics and amenities of the St. Lucie Inn was held to be a "place of entertainment" within the meaning of 42 U.S.C. section 2000a(b)(3). This holding represents a definite turning point in the government's strategy since the "entertainment" provision[10] rather than the "restaurant" provision[11] was used to attack discrimination exhibited within a bar.

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[8]473 F.2d 749 (5th Cir. 1973), *rev'g* 332 F. Supp. 316 (S.D. Fla. 1971).

[9]The affected accommodations are set out at 42 U.S.C. § 2000a (1970), as follows:

> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> (3) any motion picture house, theatre, concert hall, sports arena, stadium, or other place of exhibition or entertainment; and
>
> (4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

[10]*Id.* § 2000a(b)(3). *See* note 9 *supra.*

[11]42 U.S.C. § 2000a(b)(2) (1970). *See* note 9 *supra.*

The early cases brought against bar owners were largely unsuccessful attempts to establish coverage under the "restaurant" provision of title II of the Civil Rights Act of 1964.[12] In *Cuevas v. Sdrales*,[13] the Tenth Circuit held that a bar which served only beer was not included within the "restaurant" provision coverage since the establishment could not be construed to be a "facility principally engaged in selling food for consumption on the premises . . . ."[14] According to the *Cuevas* court, therefore, a bar per se was not included under the "restaurant" provision.[15] Even though bars per se are not covered by this section,[16] it is clear that bars in which liquor is served in conjunction with food may be treated as restaurants.[17] It is also clear that bars may be subject to derivative coverage under section 2000a(b)(4).[18] However, these cases, as cited by the district court in support of its finding in the original *United States v. DeRosier*[19] opinion, are inapposite

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[12]*See* 356 F. Supp. at 689.

[13]344 F.2d 1020 (10th Cir. 1965), *cert. denied*, 382 U.S. 1044 (1966).

[14]42 U.S.C. § 2000a(b)(2) (1970). *See* note 9 *supra*.

[15]

> Beer, and similar drinks might in some instances be classed as food, as they supply some nutriment to the body, but generally beer is considered a drink, and although it may be served in eating places, a place serving only beer is not considered a restaurant . . . .

344 F.2d at 1021.

[16]Legislative history of the Act clearly lends support to the exclusion of bars from coverage under the "restaurant" section. Senator Magnuson, Chairman of the Senate Committee for Commerce, to which the Civil Rights Bill was referred for hearings, stated that establishments included within section 201(b)(2) of the Civil Rights Act of 1964 (42 U.S.C. § 2000a(b)(2) (1970)) were facilities engaged in selling food for consumption on the premises. *See* 110 CONG. REC. 7406 (1964). Throughout his remarks, the inference is clear that the section covered eating establishments and not those principally engaged in selling drinks. The Senator stated, "A bar, in the strict sense of that word, would not be governed by title II, since it is not 'principally engaged in selling food for consumption on the premises.'"

[17]*See* Fazzio Real Estate Co. v. Adams, 396 F.2d 150 (5th Cir. 1968).

[18]*See* United States v. Fraley, 282 F. Supp. 954 (M.D.N.C. 1968). When a kitchen and dining room of the establishment occupied a substantial portion of the premises and were devoted to food service, the establishment was held to be a "restaurant principally engaged in selling food for consumption on the premises." The bar, whose room was used also as a dining room, and which held itself out as serving patrons of the restaurant, was similarly a place of public accomodation under section 2000a(b)(4). *See* note 9 *supra*.

[19]332 F. Supp. 316 (S.D. Fla. 1971), *rev'd*, 473 F.2d 749 (5th Cir. 1973).

to the present problem because they deal with the "restaurant" provision and do not involve the issue of whether a tavern or bar that offers mechanical amusement devices falls within the perview of section 2000a(b)(3). Thus, finding little judicial sympathy for coverage of bars under the "restaurant" section, the United States has shifted its emphasis to the "entertainment" section as a means of including bars.

The problem with the government's most recent effort to include bars as "places of entertainment" is that examples of establishments covered by this provision are enumerated in the statute and a broad reading is needed to expand its scope. One early group of cases took the view that any determination of the scope of the general phrase "other places of exhibition or entertainment"[20] had to be guided by the interpretive principle of *ejusdem generis*.[21] This view was first proposed in *Robertson v. Johnston*[22] in which the court held that the rule must be applied to prevent the general words from extending the operation of the statute into a field not intended. Accordingly, the *Robertson* court held that the phrase "place of entertainment" could not be construed to mean "place of enjoyment." The term had to be confined to places in which performances were presented.[23] In a similar vein, the district court in *Miller v. Amusement Enterprises, Inc.*[24] held that the use of the word "other" before the words "place of exhibition or entertainment" made it clear that the establishments under that group must be similar to those specifically enumerated.

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[20]42 U.S.C. § 2000a(b)(3) (1970). In part, this subsection provides as follows: "any motion picture house, theatre, concert hall sports arena, stadium, or other place of exhibition or entertainment . . . ." *See* note 9 *supra*.

[21]BLACK'S LAW DICTIONARY 608 (4th ed. 1951).

> [W]here general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. . . .

[22]249 F. Supp. 618 (E.D. La. 1966), *rev'd on other grounds*, 376 F.2d 43 (5th Cir. 1967).

[23]*Id.* at 618, 622. Thus, a nightclub which provided a small band or singing group was a "place of entertainment" since performances were presented. Legislative history of the Act also recognized from the very beginning that a nightclub might also be covered under section 201(b)(3) if it customarily offered entertainment which moved in interstate commerce. *See* 110 CONG. REC. 7407 (1964) (remarks of Senator Magnuson).

[24]259 F. Supp. 527 (E.D. La. 1966), *rev'd* 394 F.2d 342 (5th Cir. 1968). The district court held an amusement park was not within the coverage

However, in its decision in *Miller v. Amusement Enterprises, Inc.*,[25] the Court of Appeals for the Fifth Circuit, emphasizing the general intent and overriding purpose of the Civil Rights Act to end discrimination in certain facilities, expressed disagreement with those who would have the Act narrowly construed. Even though the legislative history was admittedly inconclusive, the court announced that the "entertainment" provision includes not only establishments which present shows, performances, and exhibitions to a passive audience, but also those which provide recreational or other activities for the amusement or enjoyment of their patrons.[26] The court stated that *ejusdem generis* cannot prevail when the result would be to defeat the statute's obvious and dominant general purpose.[27]

Noting the division of opinion in the federal courts, the United States Supreme Court has considered the meaning of the phrase "place of entertainment." The Supreme Court held in *Daniel v. Paul*[28] that in light of the overriding purpose of the Civil Rights Act of 1964 to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public, the statutory language "places of entertainment" should be given full effect according to its generally accepted meaning.[29] However, notwithstanding the Supreme Court's man-

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of the statute since the establishments specifically enumerated by Congress in section 2000a(b)(3) were all of the kind that furnished entertainment to spectators and not to participants.

[25]394 F.2d 342 (5th Cir. 1968), *modifying* 391 F.2d 87 (5th Cir. 1967), *rev'g* 259 F. Supp. 523 (E.D. La. 1966).

[26]*Id.* at 349, 350. See Miller v. Amusement Enterprises, Inc., 391 F.2d 87, 89-96 (5th Cir. 1967), for an exhaustive discussion of the legislative history of the phrase "place of entertainment." This discussion indeed shows the inconclusive nature of the legislative history of the subsection.

[27]394 F.2d at 350 *relying on* United States v. Alpers, 338 U.S. 680 (1950); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943).

[28]395 U.S. 298 (1969). The Supreme Court specifically agreed with the en banc decision of the Fifth Circuit in *Miller*.

[29]*Id.* at 307. Recognizing the respondent's argument that "place of entertainment" in the context of the statute referred only to establishments in which patrons were entertained as spectators or listeners rather than those in which entertainment took the form of direct participation, the Court said that it could find no support in the legislative history for such a reading of the statute. Although most of the discussion in Congress regarding the coverage of title II of the Civil Rights Bill admittedly focused on places of spectator entertainment rather than on recreational areas, the Court observed, "But it does not follow that the scope of section 201(b)(3)

date, the District Court for the Southern District of Florida continued to hold that a bar was not a "place of entertainment."[30] The lower court relied heavily on statements by Senator Magnuson that "a bar in the strict sense of the word would not be covered by title II . . . ."[31] However, the court failed to acknowledge that the Senator continued, with obvious reference to the restaurant provision only, "since it is not principally engaged in selling food for consumption on the premises. . . ."[32] The district court's interpretation was reversed by the Court of Appeals for the Fifth Circuit in *United States v. DeRosier.*[33]

In *DeRosier,* the appellate court followed its interpretation in *Miller* that sections 2000a(b)(3) and (c)(3) must be read with an open mind attuned to the clear purpose of the Act.[34] Thus the court read the statute, particularly the term "place of entertainment," as did the Supreme Court in *Daniel,* according to its generally accepted meaning.[35] The court of appeals refused to limit the statute by applying *ejusdem generis* and in fact held that the statute clearly specified than *any* place of entertainment is a place of public accommodation.[36] Once the phrase "place of entertain-

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should be restricted to the primary objects of Congress' concern when a natural reading of its language would call for a broader coverage. . . ." *Id.* at 307.

[30]United States v. DeRosier, 332 F. Supp. 316 (S.D. Fla. 1971), *rev'd,* 473 F.2d 749 (5th Cir. 1973). The thrust of the opinion is that "neighborhood" bars which earn an insubstantial part of their gross income through mechanical amusement means are not intended to be covered.

[31]*Id.* at 318.

[32]110 CONG. REC. 7406 (1964) (remarks of Senator Magnuson). Senator Magnuson at that time was discussing the reach of the portion of title II dealing with eating establishments and merely clarified the fact that bars which are not principally engaged in selling food would not be covered under that provision. The limitation of the Senator's comment is especially apparent when it is observed that subsequently, in the same speech, when discussing night clubs which may also be characterized as bars, Senator Magnuson stated that "a nightclub might also be covered under section 201(b)(3) if it customarily offers entertainment which moves in interstate commerce. . . ." *Id.* at 7407.

[33]473 F.2d 749 (5th Cir. 1973).

[34]*Id.* at 751.

[35]*Id.*

[36]

As opposed to this literal reading of the statute, defendants-appellees suggest that the phrase "other place of exhibition or entertainment" in Section 2000a(b)(3) refers to facilities similar in kind to those

ment" was interpreted widely enough to include an establishment such as the St. Lucie Inn, the district court adopted the appellate resolution as the single foundation for correcting its memorandum opinion in favor of the United States.[37]

Notwithstanding the generous interpretation of the phrase "place of entertainment," affirmative action in the *Deetjen* case hinged upon satisfaction of the other requirements of the Act.[38] The need for a discriminatory action required by section 2000a(a)[39] was satisfied when the Deetjens did not dispute the fact that racial discrimination had been practiced.[40] The remaining question was

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> enumerated in the statute. . . . We cannot, however, read those limitations into the statute because the words of the statute do not require that we do so and the expressed intent of the statute prohibits us from doing so. The statute does not require that the entertainment be of a certain variety or that a certain quantum of the establishment's business be derived from the entertainment of its customers. On the contrary, the statute clearly specifies that ". . . any . . . place of entertainment" is a place of public accommodations within its meaning if that establishment's operations affect commerce.

*Id.* at 752.

[37]356 F. Supp. at 691. The district court had entered a memorandum opinion on January 4, 1973, supporting their own ruling in the earlier *DeRosier* case that a local bar was not a "place of entertainment." When the Court of Appeals for the Fifth Circuit reversed the earlier *DeRosier* opinion, the District Court for the Southern District of Florida amended its January 4 memorandum opinion in order to follow what was in fact now the law of the Fifth Circuit.

[38]Generally, the requirements for action under title II of the Civil Rights Act of 1964 are the following: a discriminatory act to satisfy subsection (a), a place of public accommodation within subsection (b), and either state action supporting the discrimination within subsection (b) or the operations of the establishment affecting commerce within the meaning of subsection (c). *See* Note, *Public Accommodations*, 16 CASE W. RES. L. REV. 660 (1964). The first and last requirements were held satisfied in the memorandum opinion of Judge Atkins on January 4, 1973. It was not until after *DeRosier* that the second requirement was held satisfied in the amendment to the memorandum opinion on February 15, 1973.

[39]This subsection reads as follows:

> All persons shall be entitled to the full and equal enjoyment of all goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation of the ground of race, color, religion, or natural origin.

[40]The United States was ready to prove through testimony of various witnesses that the defendants had maintained a long standing policy and

whether the operations of the St. Lucie Inn affected commerce within the meaning of section 2000a(c)(3).[41] The parties in *Deetjen* had stipulated that the juke box, piano, and television set provided at the St. Lucie Inn were sources of entertainment for the customers and had further stipulated that these sources of entertainment were manufactured outside the State of Florida. This type of stipulation taken together with the generally accepted meaning of the Act, enabled the court of appeals in *DeRosier* to find that the presence of foreign mechanical means of amusement would comport with a literal interpretation of the Act. The same mechanical devices which cause an establishment to be a "place of entertainment" when provided for the use and enjoyment of its patrons must certainly be considered "sources of entertainment." Additionally, the legislative history of section 2000a(c)(3) indicates that Congress specifically considered such mechanical and stationary machines as a juke box, pool table, and shuffle board to be "sources of entertainment" within the meaning of the section.[42] Indeed, the Senate rejected an amendment which would have ruled out most mechanical sources by requiring that the "source of entertainment" be one which has not come to rest within a State.[43]

The courts have long since established that a source of entertainment "moves in commerce" within the meaning of section

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practice of refusing to provide service to Negroes in the cocktail lounge portion of the St. Lucie Inn and that Negroes were allowed to purchase liquor only at a drive-in package store window. The evidence would allegedly show multiple incidents of the racially discriminatory policy and practice. The evidence would also allegedly show defendants' explicit admissions of such a policy and practice. *See* Brief for the United States at 8.

[41]This subsection reads as follows:

> The operations of an establishment affect commerce within the meaning of this subchapter if . . . (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce . . . . For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

[42]Daniel v. Paul, 395 U.S. 308 (1969).

[43]110 CONG. REC. 13915-21 (1964), *quoted in* Daniel v. Paul, 395 U.S. 307 (1969). *See also* 110 CONG. REC. 7402 (1964) (remarks of Senator Magnuson).

2000(c)(3) if it orginates in a state other than the one in which it is being presented.[44] When considering a question similar to that involved in *Deetjen,* the Supreme Court held that a club's customary sources of entertainment "moved in commerce" not only because the club leased fifteen boats from another state, but also because the club's juke box and records were manufactured outside the state.[45] Similarly, after finding a skating rink to be a place of entertainment, the court in *Evans v. Seaman*[46] concluded that the source of entertainment was the use of skates on the surface of the rink. Since the skates and parts came from outside the state, they constituted a source of entertainment which "moved in commerce." The same reasoning was followed in *United States v. L. C. Vizena,*[47] in which the court found that the juke box, records, and coin-operated pool table located in a bar were mechanical sources of entertainment which had "moved in interstate commerce." This finding made it clear that the bar's operations "affected commerce" within the meaning of section 2000a(c)(3). Since the "sources of entertainment" at the St. Lucie Inn were not only "customarily" presented but were permanently provided and had "moved in commerce" within the meaning of the statute, as interpreted by the cases, they were sufficient vehicles to furnish the interstate commerce connection required by the Act.

*Deetjen* demonstrates the extension of the phrase "place of entertainment" to reach a bar containing mechanical means of amusement. The next logical step, that of designating a bar itself a "place of entertainment" and the service of alcoholic beverages as a "source of entertainment" customarily presented, has apparently been taken in *United States v. Martin Eric, Inc.*[48] This

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[44]*See* Twitty v. Vogue Theatre Corp., 242 F. Supp. 281 (M.D. Fla. 1965).

[45]Daniel v. Paul, 395 U.S. 308 (1969).

[46]452 F.2d 749 (5th Cir. 1971).

> The remaining question, therefore, is whether the operations of Seaman's roller rink "affect commerce" within the meaning of § 2000a(c)(3). We conclude that they do. The rink is not entertaining by itself. Rather its source of entertainment is the use of the roller skates upon its surface. Those roller skates and the replacement parts for them were purchased from an Alabama company. The skates, therefore, constitute the "sources of entertainment" which "move in commerce."

*Id.* at 751.

[47]342 F. Supp. 555 (W.D. La. 1972).

[48]No. 72-C-142 (N.D. Ill., Apr. 14, 1972), *quoted in* Brief for the United States at 12, 19.

holding completes the coverage of the Civil Rights Act of 1964 to include all bars.

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**CRIMINAL PROCEDURE**—DOUBLE JEOPARDY—Retrial on greater charge after guilty plea to lesser included offense vacated held violative of fifth amendment double jeopardy clause.—*Rivers v. Lucas*, 477 F.2d 199 (6th Cir. 1973).

On October 19, 1970, an information was filed in the Recorder's Court for the City of Detroit, Michigan, charging Senarfis Rivers with the offense of murder in the first degree in the perpetration of a larceny. Three months later, Rivers entered a plea of guilty to the lesser included offense of manslaughter. This plea was accepted by the trial court and Rivers was sentenced to a term of not less than fourteen nor more than fifteen years in the state prison.

On March 23, 1972, the Michigan Court of Appeals reversed Rivers' conviction and remanded the case to the recorder's court.[1] Another information charging Rivers with perpetration of felony-murder, or murder in the first degree, was subsequently filed with the recorder's court. Upon exhaustion of his state remedies,[2]

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[1]The sole authority cited by the court of appeals for the reversal was People v. Jaworski, 387 Mich. 21, 194 N.W.2d 868 (1972). This case held that prior to accepting the guilty plea of a defendant, the trial court must specifically inform the defendant of his constitutional rights against self-incrimination, to trial by jury, and to confront his accuser.

[2]The issue of exhaustion of state remedies was considered by the United States Court of Appeals, but is beyond the scope of this Recent Development. Prior to reaching the district court, Rivers filed a motion with the recorder's court to quash the information or to reduce the charge to manslaughter, and this motion was denied. He then filed four motions with the Michigan Court of Appeals: an emergency application for leave to appeal, a motion for immediate consideration of that motion, a motion for a stay of the order of the recorder's court, and a motion for immediate consideration of that motion. The court of appeals granted the motions for immediate consideration and denied the other motions. He then filed four motions with the Michigan Supreme Court: a motion for leave to appeal to the supreme court, a motion to by-pass the Michigan Court of Appeals, a motion for a stay, and a motion for immediate consideration. The

Rivers filed an application for a writ of habeas corpus in federal district court.[3] The district court granted the writ conditionally and ordered that Rivers be released from custody unless the state would reduce the charge on the information to "not more than manslaughter."[4] On appeal by the state, the United States Court of Appeals for the Sixth Circuit, in the case of *Rivers v. Lucas*,[5] affirmed the order of the district court.

In his application for a writ of habeas corpus, Rivers argued that in charging him anew with felony-murder, the state was placing him twice in jeopardy on that charge in violation of the fifth amendment to the United State Constitution.[6] The Sixth Circuit relied upon the United States Supreme Court case of *Green v. United States*[7] which held that when a jury had failed to find a defendant guilty of the crime charged and had convicted him of a lesser offense, the state could not again place the defendant in jeopardy on the greater offense following reversal of the conviction. The *Rivers* court concluded that for purposes of double jeopardy, there is no difference in effect between a jury's failure to convict a defendant and "a court's implicit refusal to do so"[8] when it accepts a plea of guilty to a lesser included offense. Therefore, for the state to charge Rivers a second time with first-degree murder was to place him twice in jeopardy for the same offense, in violation of the fifth amendment.

The cornerstone of the holding in *Rivers* was the decision of the Sixth Circuit Court of Appeals in the 1970 case of *Mullreed v. Kropp*.[9] That case began in 1954 when Joseph Mullreed was charged by information with armed robbery.[10] When

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supreme court also granted the motion for immediate consideration and denied the other motions. Rivers v. Lucas, 477 F.2d 199, 200-01 (6th Cir. 1973).

[3]28 U.S.C. § 2254 (1970).

[4]Rivers v. Lucas, 345 F. Supp. 718, 719 (E.D. Mich. 1972).

[5]477 F.2d 199 (6th Cir. 1973).

[6]"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

[7]355 U.S. 184 (1957).

[8]477 F.2d at 202.

[9]425 F.2d 1095 (6th Cir. 1970).

[10]MICH. COMP. LAWS ANN. § 750.529 (1948) states:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money

Mullreed stood mute, the court entered a plea of not guilty for him. One week later, the state entered an additional count of "robbery unarmed,"[11] and Mullreed entered a plea of guilty to this lesser offense without benefit of counsel. He was sentenced by the trial court to serve ten to fifteen years in the state prison. Because he had been convicted and sentenced without benefit of counsel, a federal district court granted his petition for a writ of habeas corpus,[12] and Mullreed was released from prison after having served nearly two years of his sentence.

Immediately upon his release, Mullreed was arrested by the state police. He was tried before a jury on the charge of armed robbery, and returned to prison under a sentence of fifteen to thirty years.[13] After spending eleven years exhausting his state remedies,[14] Mullreed turned to the federal courts. His petition for

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> or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

*See* note 22 *infra* & accompanying text.

[11]MICH. COMP. LAWS ANN. § 750.530 (1948) states:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than fifteen 15 years.

Prosecutor Kenneth B. Johnson was uncertain whether a chair would constitute a dangerous weapon under the armed robbery statute. Mullreed v. Bannan, 137 F. Supp. 533 (E.D. Mich. 1956); *see* note 22 *infra* & accompanying text.

[12]Mullreed v. Bannan, 137 F. Supp. 533 (E.D. Mich. 1956). Gideon v. Wainwright, 372 U.S. 335 (1963), which would have required automatic reversal of the conviction, had not yet been decided. The district court relied instead upon Powell v. Alabama, 287 U.S. 45 (1932), employed a "totality of the circumstances" test, and found that Mullreed was badly in need of counsel at his trial. 137 F. Supp. at 538. Significantly, in granting the writ, Judge Picard gave no indication of what avenues of prosecution remained open to the state.

[13]425 F.2d at 1097. There is no indication that the count of unarmed robbery to which Mullreed had pleaded guilty two years earlier, was included in the second information.

[14]Mullreed filed a motion for a new trial, an amended motion for a new trial, a petition for writ of habeas corpus, which was denied by the Michigan Supreme Court, a motion to vacate judgment filed in the state

a writ of habeas corpus, based upon violation of the double jeopardy clause of the fifth amendment, was denied by the district court and Mullreed appealed that decision to the Sixth Circuit Court of Appeals.

After deciding that the fifth amendment applied to the state proceedings under attack,[15] the *Mullreed* court took note that under the Supreme Court's ruling in *Green*, if the defendant had been convicted of the lesser offense by a jury, the state would not be allowed to reinstate the court for the greater offense.[16] The court then reasoned that since under the statutes and court rules of Michigan[17] a trial court may not accept a plea of guilty if it has reason to doubt the truth of that plea, there is for double jeopardy purposes no essential difference between the jury verdict of guilty and the acceptance of a plea of guilty by the trial court.[18] By thus analogizing to the jury trial, the court concluded that the conviction of Mullreed for armed robbery was a violation of the double jeopardy clause.[19]

Basic differences exist between the reasoning used by the Sixth Circuit in *Mullreed* and the reasoning it later used in *Rivers*

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trial court, and an application for leave to file a delayed appeal, which was also denied by the Michigan Supreme Court. *Id.*

[15]This was the first case in the Sixth Circuit to hold Benton v. Maryland, 395 U.S. 784 (1969), retroactive. *Benton* in turn was the first case to hold the fifth amendment's double jeopardy clause applied to the states through the fourteenth amendment. The Supreme Court left the issue of the retroactivity of *Benton* to the lower courts.

[16]425 F.2d at 1100. This was the explicit holding of the United States Supreme Court in Green v. United States, 335 U.S. 184 (1957). The Court offered alternative grounds for its holding in *Green*: 1) that the jury's failure to convict on the greater offense carried an implicit acquittal on that charge, or 2) that the jury was discharged, without the defendant's consent, and without having reached a verdict, thereby bringing to an end the defendant's jeopardy on the greater offense. *Id.* at 190-91. The former grounds were reaffirmed by a unanimous Court in Price v. Georgia, 398 U.S. 323 (1970).

[17]MICH. COMP. LAWS ANN. § 768.35 (1948); MICH. GENERAL COURT RULE 785.3(2).

[18]"We think the conviction and sentence necessarily show that the trial court found an evidentiary concurrence of the elements required for the conviction . . . ." 425 F.2d at 1100.

[19]The State of Michigan argued to no avail that the court's reasoning was erroneous in that the errors of the initial proceeding affected the fact-finding process, thus subjecting to question any finding that the defendant was unarmed. *Id.* at 1101. This argument was passed over and never really answered by the court.

*v. Lucas*, and these differences will be analyzed below. It should be noted at this point, however, that the *Mullreed* court went on to butress its holding with a construction of the statutes involved. The court concluded that the conviction for the lesser offense required a finding[20] that Mullreed was unarmed. Under the doctrine of collateral estoppel, such a judicial finding would bar a later prosecution for armed robbery.[21] The weight attributed to this reasoning by the *Mullreed* court is, of course, indeterminable, but it should be recognized that the *Rivers* court did not avail itself of this technique of statutory construction.[22] To the extent that the earlier decision relied upon such reasoning, the *Rivers* court arguably should have discounted *Mullreed*.

As previously stated, *Mullreed* provided the cornerstone for the *Rivers* decision. But much had happened in the years following 1970 to suggest that the Sixth Circuit might decide *Rivers* differently. Another circuit court of appeals had handed down an opinion with very strong dictum contrary to the *Mullreed* holding.[23] The Michigan Court of Appeals had rejected both the holding and the reasoning of the Sixth Circuit decision, and had explicitly refused to follow it.[24] Perhaps most importantly, the United States Supreme Court had seriously undercut the holding of the case.[25] Full analysis of the reasoning of *Rivers* requires examination of these additional influences.

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[20]The court actually spoke of an "affirmative finding," thereby repeating its view that a trial judge, in accepting a guilty plea, is to perform to a large extent the fact-finding duties that a jury would otherwise perform in trial.

[21]425 F.2d at 1102. For a discussion of the doctrine of collateral estopped in criminal law, see Ashe v. Swenson, 397 U.S. 436 (1970); Schaefer, *Unresolved Issues in the Law of Double Jeopardy*, 58 CALIF. L. REV. 391 (1970).

[22]This might be a potential ground for distinguishing *Mullreed* from the *Rivers*-type case, in that under the construction by the Sixth Circuit of the Michigan statute, *see* notes 10, 11 *supra*, "robbery unarmed" is not in fact a lesser included offense of armed robbery. Rather they are mutually exclusive offenses. This distinction would seem unimportant in light of the decision in *Rivers*, however, because manslaughter is a lesser included offense of murder.

[23]Ward v. Page, 424 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 917 (1970).

[24]People v. McMiller, 38 Mich. App. 99, 195 N.W.2d 801 (1972); People v. Harper, 32 Mich. App. 73, 188 N.W.2d 254 (1971).

[25]Santobello v. New York, 404 U.S. 257, 263 n.2 (1971).

At about the same time that the Sixth Circuit decided *Mullreed*,[26] the Tenth Circuit reached an opposite conclusion in the similar case of *Ward v. Page*.[27] Arly Ward had been charged with murder in 1947 in Tulsa County, Oklahoma, and was tried before a jury. After all the evidence was in, but before the case was submitted to the jury, Ward pleaded guilty to manslaughter in the first degree under an agreement with the county attorney and the trial court.[28] He was sentenced to a term of forty years in the state penitentiary. Ward appealed to the state and federal court systems[29] until a federal district court, finding the plea to have been involuntarily made,[30] granted a writ of habeas corpus.[31]

The State of Oklahoma chose to retry Ward on the original charge of first degree murder,[32] for which Ward was convicted and sentenced to life imprisonment. On appeal to the Oklahoma Court of Criminal Appeals, Ward raised the defense of former jeopardy. The court did not accept the argument as set forth

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[26]*Mullreed* was decided on April 16, 1970, and the opinion was amended on May 4. *Ward* was decided on April 15, 1970, one day prior to *Mulreed*, and rehearing was denied on May 13, 1970.

[27]424 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 917 (1970).

[28]Ward's attorney, the prosecuting attorney, and the trial judge represented to Ward that if he would plead guilty, the remaining portion (about fourteen years) of a twenty-five year sentence imposed upon him by another Oklahoma court for armed robbery would run concurrently with the forty-year sentence to be imposed upon him in the present case. The facts of the case may be found in Ward v. Page, 238 F. Supp. 431 (D. Okla. 1965). *See also* Ward v. Rainer, 360 P.2d 953 (Okla. Crim. 1961); Ward v. Page, 336 F.2d 602 (10th Cir. 1962); Ward v. State, 444 P.2d 255 (Okla. Crim. 1968); Ward v. Page, 424 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 917 (1970).

[29]Ward received no relief through his appeal, Ward v. State, 210 P.2d 790 (Okla. Crim. 1949), then filed two petitions for habeas corpus with the Oklahoma Court of Criminal Appeals. Both were denied, the first without opinion. Ward v. Rainer, 360 P.2d 953 (Okla. Crim. 1961). His petition for habeas corpus to the proper federal district court was denied, but not reported, and on appeal to the Tenth Circuit Court of Appeals, he contested the voluntariness of his plea. That court remanded the case to the district court on the issue of voluntariness. Ward v. Page, 336 F.2d 602 (10th Cir. 1964). While the district court had heard evidence on the issue in the earlier proceedings, it had failed to rule on the issue.

[30]*See* note 28 *supra*.

[31]Ward v. Page, 238 F. Supp. 451 (D. Okla. 1965).

[32]Ward filed a plea to jurisdiction, a plea of acquittal of offense charged, and a motion to dismiss by reason of former jeopardy in opposition to this effort by the state. All were overruled by the trial court. Ward v. State, 444 P.2d 255 (Okla. Crim. 1968).

by Ward, but ruled instead that the state was estopped from enforcing a charge of murder against Ward on retrial. In other words, the state was to be held to its bargain. In reaching this conclusion, the court specifically limited its holding to the facts of the case, and stressed that each appeal would be considered on its own merits.[33] Rather than reverse the conviction and remand the case, however, the court decided that the jury, under proper instructions, had necessarily found Ward guilty on the manslaughter charge as well, and accordingly reduced the life sentence to forty years.[34]

On the second time around, Ward's petition for habeas corpus was denied by the federal district court, and Ward appealed that ruling to the Tenth Circuit Court of Appeals, where he again pressed his double jeopardy argument. That court rejected Ward's contention.[35] The basis of the court's decision was simple: a guilty plea to a lesser offense does not operate as an acquittal on all greater offenses because the implications of the plea are not the same as those of the jury verdict.[36] The court did not elaborate on this point, but the suggestion might be that the purpose of the inquiries by the trial court prior to accepting a guilty plea is the prevention of imprisonment of the innocent, rather than the prevention of insufficient punishment. Stated differently, the concern of the trial judge is the guilt of the defendant on the lesser charge to which he is pleading, not the defendant's guilt on the greater offense for which he might be punished if the plea is rejected.[37]

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[33]*Id.* at 261

[34]*Id.*

[35]Ward v. Page, 424 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 917 (1970).

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> [U]nder these procedural facts it cannot be said that Ward was acquitted of the offense of first degree murder. It is true that a guilty plea is as final as a jury verdict but double jeopardy implications reverberating from a guilty plea and a jury verdict are not identical. In [Booker v. Phillips, 418 F.2d 424 (10th Cir. 1969)], it was plainly apparent from the instructions given to the jury that the verdict on the lesser included offense operated as an acquittal on the greater offense. But we have found no cases, and appellant alludes to no authority, which suggests that a guilty plea to a lesser offense operates as an acquittal on all greater offenses.

*Id.* at 493 (footnotes omitted).

[37]Another variation of this issue would deal with the competency, rather than the purpose, of the trial court to adjudicate the issue of guilt on the

The first reported case to arise in Michigan at the appellate level following *Mullreed* and *Ward* was *People v. Harper*.[38] In that case the majority of the Michigan Court of Appeals sided immediately with the Tenth Circuit's decision,[39] and upheld the validity of Harper's trial for first degree murder following vacation of his plea of guilty to manslaughter.[40] The opinion then expressed "total disagreement with the *Mullreed* opinion."[41] The state court accepted every contention made by the State of Michigan in *Mullreed*, and specifically rejected the Sixth Circuit's

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greater charge. In Commonwealth v. Therrien, 269 N.E.2d 687 (Mass. 1971), the Supreme Judicial Court of Massachusetts said of a similar fact situation:

> Unlike the jury in the *Green* case, the judge here did not have the option to find the defendant guilty of first degree murder. . . . [W]e are of the opinion that acceptance by the judge of a defendant's plea to second degree murder does not constitute an inferential finding of not guilty of first degree murder for the purposes of double jeopardy. The question of guilt of first degree murder was one which the judge did not have the power to decide, and one which was never before him. Therefore the defendant was never placed in jeopardy by the judge's consideration of his guilty plea of anything more than that to which he pleaded guilty.

*Id.* at 690-91 (footnotes omitted). *Therrien* is distinguishable from the cases under consideration in two major respects. First, the defendant's sole ground for withdrawl of his plea was that he thought he could be found not guilty. *Id.* at 690. Thus, Therrien's initial conviction did not suffer from the constitutional infirmities present in *Rivers*, *Mullreed*, and *Ward*. Secondly, the Massachusetts court also presented the alternative ground of waiver for its rejection of Therrien's defense of former jeopardy. The problems which might plague the waiver theory in cases such as *Rivers* were absent in *Therrien*, wherein the trial judge had informed the defendant that if the plea were withdrawn, the defendant would again be subject to a first degree murder charge. *Id.* at 689. While the problems of voluntariness of such a waiver did not exist in *Therrien*, Rivers was never presented with such a warning.

[38]32 Mich. App. 73, 188 N.W.2d 254 (1971).

[39]*Id.* at 76-77, 188 N.W.2d at 256.

[40]Harper had tried to enter a plea of guilty to second degree murder, but after examination by the trial court, the court decided that Harper could be guilty of no more than manslaughter, and a plea of guilty to that charge was accordingly entered. That conviction was set aside due to the impropriety of the examination. Upon retrial, the defendant again entered a plea of guilty to second degree murder, and the plea was accepted by the trial court. *Id.* at 75-76, 188 N.W.2d at 256.

[41]*Id.* at 81, 188 N.W.2d at 258. This composed part "II" of the majority opinion, but actually expressed the opinion of only one of the three judges of the court, specifically Presiding Judge Gillis, who authored the opinion.

construction of the statutes involved.[42] A year later, the Michigan Court of Appeals specifically affirmed its attack on *Mullreed,* in *People v. McMiller.*[43]

Yet another potential influence on the *Rivers* court might have been dictum by the United States Supreme Court in *Santobello v. New York.*[44] This case related only peripherally to the issues of *Rivers,* yet might have lent strength to the position of the *Ward* court and the Michigan Court of Appeals. *Santobello* dealt with the voluntariness of a guilty plea entered under an agreement with the prosecutor, when the bargain was later ignored by a subsequent prosecutor.[45] The Court remanded the case to the New York courts to determine whether to allow Santobello to withdraw his plea or to grant specific performance of the plea arrangement. In a footnote to the majority opinion, however, Chief Justice Burger said, "If the state decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the original charge . . . ."[46] This was, of course, dictum; but the Court, while not deciding the issue, would seem to have tacitly adopted the *Ward* position rather than that of the *Mullreed* court. Upon remand,[47] the New York Court of Appeals ordered specific performance of the agreement; thus, any potential double jeopardy issue was avoided. One dissenter on the New York court, however, would have allowed Santobello to plea anew to the original charge of two felonies.[48]

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Judge Danahof concurred in part I, but not in part II of Judge Gillis' opinion: "It is not that I disagree with what Judge Gillis states in part II, but I do not believe it is necessary for a decision in this case." *Id.* at 82, 188 N.W.2d at 258-59. Judge Mahinske, a circuit judge sitting by appointment, dissented with an opinion, but significantly did not mention *Mullreed* in support of his position.

[42]*Id.* at 82, 188 N.W.2d at 258.

[43]38 Mich. App. 99, 195 N.W.2d 801 (1972).

[44]404 U.S. 257 (1971).

[45]The first prosecutor, in exchange for the guilty plea, agreed with the defendant to make no recommendation as to the sentence. The plea was accepted, and a series of postponements ensued, some of which were attributable to the defendant. Seven months later, Santobello stood ready for sentencing; a second prosecutor, who by this time had replaced the first and was apparently unaware of the agreement, recommended the maximum sentence of one year. *Id.* at 258-60.

[46]*Id.* at 263 n.2.

[47]People v. Santobello, 39 App. Div. 654, 331 N.Y.S.2d 776 (1972).

[48]*Santobello* was unique from the other cases discussed herein in that the relief Santobello requested was the opportunity to plead anew to the

It is clear, then, that an ample supply of precedent[49] and judicial reasoning existed for the Sixth Circuit Court of Appeals to reverse, or at least limit, its *Mullreed* holding if it so chose when it was confronted with *Rivers*. Instead, the court affirmed *Mullreed*, while apparently modifying the reasoning of that case to some extent. The court first pointed to the United States Supreme Court decision of *Price v. Georgia*,[50] which had been handed down shortly after the *Mullreed* decision, and implied that *Price* somehow supported the earlier position of the Sixth Circuit.[51] In *Price*, however, the Supreme Court dealt with a situation in which a jury had impliedly acquitted a defendant on the greater charges, rather than a trial judge's doing so. The *Mullreed* court had relied upon *Green* by analogy.[52] The Court in *Price* reaffirmed and clarified *Green*, but in doing so the Court in no way strengthened the analogy drawn by the *Mullreed* court. Thus, the implication in the *Rivers* opinion that *Price* in some manner supported the *Mullreed* position on former jeopardy stemming from plea arrangements would seem tenuous at best.

The *Rivers* court seemed to modify the reasoning of *Mullreed*, however, in that it no longer placed sole reliance upon the theory that the trial judge had rendered a decision regarding the guilt of the defendant on the greater charge. The court seemed to base its holding additionally on a theory of estoppel against the

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original charges. After entering his plea, Santobello learned that much of the evidence against him had been obtained through an illegal search. 404 U.S. at 258. Thus, Santobello apparently believed that with that evidence excluded from trial he could win an acquittal on the felony charges against him without having to serve a year in prison in exchange therefor.

[49]*See* notes 27, 28, 29 *supra* & accompanying text. Other cases include strong dictum indicating support for the *Ward* result, for example:

> We have grave doubts as to Wells' pressing his motion for leave to withdraw his plea. If he is ultimately successful, we know of nothing to prevent the government from reviving the two counts which were dismissed by the trial judge.

United States v. Wells, 430 F.2d 225, 230 (9th Cir. 1970). *See also* United States *ex. rel.* Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971); Sanders v. State, 85 Ind. 318 (1882) (defendant who takes a new trial at his own request cannot claim that the former proceedings constituted a former jeopardy); People v. Taylor, 322 N.Y.S.2d 818, 821 (1971). *See generally* Comment, *Harsher Sentences on Re-Trial*, 38 TENN. L. REV. 562, 564-66 (1971); Annot., 75 A.L.R.2d 683 (1961).

[50]398 U.S. 323 (1970).

[51]477 F.2d at 202.

[52]*See* note 19 *supra*.

state: "there is implicit in a court's acceptance of a plea to an included lesser offense a determination that the right to prosecute the defendant on the more serious charge . . . has been relinquished."[53] This was the same approach used by the Oklahoma Court of Criminal Appeals in *Ward v. State*,[54] and rejected by the Tenth Circuit Court of Appeals in *Ward v. Page*.[55] The *Rivers* court did not totally abandon its earlier reasoning, however, as it again equated the actions of the trial judge with the actions of the jury.[56] When joined with the reference to the *Price* case, this analogy drawn by the court would seem to indicate that the Sixth Circuit has at least tacitly retained the "implied acquittal" logic of the *Mullreed* opinion. Thus, it would appear that the court based its decision in *Rivers* upon a combination of the theories of estoppel and acquittal.

The *Rivers* court concluded that the *Santobello* decision need not affect its action because the Supreme Court did not consider the potential double jeopardy plea in that case.[57] As noted above, this is technically a correct reading of the language in *Santobello*, albeit one which ignores the implications which could be drawn from the dictum in that opinion.

The Sixth Circuit noted the refusal of the Michigan Court of Appeals to apply the *Mullreed* decision, and quoted from the *Harper* opinion at length.[58] The court made no further comment upon these state court opinions other than to suggest that the attitude of the Michigan state courts would be considered a factor in determining whether a petitioner had exhausted his state remedies as required by the habeas corpus statute.[59]

The Sixth Circuit in *Rivers* also failed to respond anew to the arguments which had been made on behalf of the State of Michigan in the *Mullreed* case, but more disappointing was the refusal of the court to discuss its several points of disagreement with the

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[53]477 F.2d at 202.

[54]444 P.2d 255 (Okla. Crim. 1968).

[55]424 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 917 (1970).

[56]477 F.2d at 202.

[57]*Id.*

[58]*Id.* at 203.

[59]28 U.S.C. § 2254 (1970).

*Ward* decision. The court simply acknowledged the existence of *Ward* and stated its adherence to *Mullreed.*[60]

Thus, the Sixth Circuit has reaffirmed its position that if a defendant enters a plea of guilty to a lesser offense, and is subsequently successful in vacating that plea, the state may not constitutionally retry him on the greater charge. In taking this position, the court seems to stand alone. The ramifications of the *Rivers* position upon the now-commonly accepted practice of plea-bargaining[61] might be great: the reluctance of prosecutors to offer, and of trial judges to accept, such "bargains" might increase drastically. Moreover, the logic of the *Rivers* position would seem to be untenable, particularly with reference to the "implicit acquittal" theory. It is apparent that while a trial judge is reluctant to accept a guilty plea from an arguably innocent defendant,[62] due to pressures of the docket he is likewise reluctant, if in fact able, to ascertain the fact of guilt or innocence of the defendant to charges other than those to which he is pleading. Moreover, one might question the competence of a trial judge to make a finding of fact on a question which is not before the court; in other words, as the Massachussets Supreme Court has pointed out,[63] only the issue of guilt on the lesser charge is before the court when the defendant enters his plea. The danger, if not the illogic, of the estoppel theory may be demonstrated by reversing the question, to wit: should the defendant not be estopped under the same theory from attacking the validity of his plea? Certainly the defendant, too, waives certain rights by accepting a bargain and pleading guilty.[64]

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[60]"The Court has considered the arguments of appellants and the cases cited by them, including Ward v. Page . . . . We continue to adhere to our decision in Mullreed v. Kropp, *supra.*" 477 F.2d at 203.

[61]*See generally* Santobello v. New York, 404 U.S. 257, 263 (1971) (Douglas, J., dissenting); Carroway, *Multiple Offense Problems,* 1971 UTAH L. REV. 105.

[62]This is, of course, an understatement of the law. In Michigan, the trial judge is required to determine that there is a factual basis for the plea. *See* note 17 *supra.* Such is also the requirement in federal courts. FED. R. CRIM. P. 11. *See* North Carolina v. Alford, 400 U.S. 25 (1970).

[63]Commonwealth v. Therrien, 269 N.E.2d 687 (Mass. 1971). *See* note 37 *supra.*

[64]Boykin v. Alabama, 395 U.S. 238 (1969). *See* note 1 *supra.*